

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF NEW MEXICO

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 VS.

CR. NO. 14-2783 JB

7 THOMAS R. RODELLA, SR.,

8 Defendant.

10 VOLUME 2

11 Transcript of Motion Proceedings before  
12 The Honorable James O. Browning, United States  
District Judge, Albuquerque, Bernalillo County,  
New Mexico, commencing on September 16, 2014.

14 For the Government: Ms. Tara C. Neda; Mr. Jeremy Pena

For the Defendant: Mr. Robert Gorance

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1                   THE COURT: Good morning everyone. I  
2 appreciate everyone making themselves available to me  
3 this morning.

4                   All right. Given where we are, I think the  
5 best thing to do is probably go to the pretrial  
6 conference, and discuss a few things. Y'all have  
7 done a lot of this. This shouldn't take too long.  
8 But let's see if we can take those issues up and try  
9 to start dealing with the experts. Length of trial,  
10 Ms. Neda, what do you think? How long do you think  
11 the trial is going to last?

12                  MS. NEDA: I'm hoping just one week,  
13 because I assume the jury selection will take some  
14 time on Monday, but I think we both agreed we would  
15 finish this up by the end of the week.

16                  THE COURT: You actually told us four days,  
17 so I guess I'm surprised that we're going into a full  
18 week. What's your thoughts?

19                  MS. NEDA: If jury selection isn't lengthy,  
20 I would say four days, sir.

21                  MR. GORENCE: Your Honor, can we remain  
22 seated for this portion?

23                  THE COURT: That would be fine.

24                  MR. GORENCE: I concur with Ms. Neda that  
25 initially I thought four days. But I see by the

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1 tentative rulings by the Court that if we get into  
2 three 404(b) incidents, I think that will -- and I  
3 hadn't anticipated that when we first talked about  
4 length of trial, Your Honor -- but I think that will  
5 greatly increase, at least by a day. And if we're  
6 counting all three -- because that's going to be a  
7 fair amount of developing; I'll be bringing in  
8 photographs of where they were, what transpired, and  
9 I anticipate very lengthy cross-examination -- then  
10 there will be other testimony about those incidents.  
11 So I'm modifying my original estimate by virtue of  
12 some of the Court's tentative rulings.

13 I know we have a tentative ruling. I'm  
14 ready to argue at some point on the SOPs. And if  
15 they come in, I think that will -- again, I'm not  
16 arguing or quibbling with the Court's ruling -- but  
17 I'm modifying by virtue of things I didn't anticipate  
18 early on.

19 So I think it will take all of the week by  
20 virtue of other things that will be at issue in this  
21 case that I hadn't contemplated when we first talked.

22 So --

23 THE COURT: Well, we've got to come up with  
24 a firm date. Let's get it done in one week. I think  
25 that's plenty of time to try this case. Because I've

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1       got to tell the jury on Monday how long this trial  
2       will last, and I don't want to just go in there with  
3       a: Well, we're going to go a little longer and stuff  
4       like that. You've got five days to try the case.  
5       Get it done in that period of time.

6                    MR. GORENCE: Yes, Your Honor.

7                    THE COURT: Closings: Do you want closings  
8       before or after instructions?

9                    MS. NEDA: I would like the closings after  
10       the instructions, so that we may refer to them.

11                  THE COURT: Mr. Gorence?

12                  MR. GORENCE: I concur.

13                  THE COURT: All right. We talked about the  
14       courtroom. It will be here. Preliminary  
15       instructions. I sent it to you yesterday. Ms. Neda,  
16       Mr. Pena, do y'all have any objections, comments,  
17       suggestions on that?

18                  MR. PENA: Yes, Your Honor, we do have some  
19       problems with the instructions that -- on page 7 it  
20       does indicate that the Court is referencing  
21       Defendant's Proposed 1 and 2 -- oh, the preliminary  
22       one, just the preliminary one, Your Honor?

23                  THE COURT: Yes.

24                  MR. PENA: I have no problem with that.

25                  MR. GORENCE: No problem. I know this is

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1 to give the jury a feel. I have no problem with  
2 that. I know we have other issues with regard to the  
3 final jury instructions.

4 THE COURT: And I haven't worked on those.

5 I obviously looked at your finals to come up with the  
6 elements here. But what were you going to say, Mr.  
7 Pena, what issue did you have?

8 MR. PENA: They pertained to defendant's  
9 proposed jury instructions 1 and 2, sir.

10 THE COURT: Oh, okay. But the preliminary  
11 instruction is fine?

12 MR. PENA: Yes.

13 THE COURT: Okay. Notice it says  
14 notetaking, questions by jurors. All that was  
15 fine --

16 MR. PENA: Yes, sir.

17 THE COURT: -- with everybody? That was  
18 all right with you, Mr. Gorence?

19 MR. GORENCE: Yes, Your Honor.

20 THE COURT: How many alternates do you want  
21 to have for this trial?

22 MS. NEDA: Two.

23 MR. GORENCE: I think that would be  
24 sufficient.

25 THE COURT: All right. We'll do two. Do

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1 you want to discharge them before they deliberate?

2 Do you want to keep them both under charge? Do you  
3 want to keep one under charge, discharge the other?

4 MS. NEDA: Keep them under charge.

5 MR. GORENCE: I concur, Your Honor.

6 THE COURT: All right. We'll keep them  
7 both under charge then.

8 Let's talk about how we're going to run the  
9 trial. We can do a rather traditional trial; start  
10 time at 8:30 or 9:00, take a break for lunch, close  
11 at 5:00, if we're staying on-track; 5:30 or 5:00,  
12 depending on whether we're staying on-track. Or we  
13 could start early and run through lunch, just take  
14 short breaks, and break a little bit earlier in the  
15 day. What's your thoughts? Traditional, or do you  
16 want to do something different here?

17 MS. NEDA: Traditional, but for the fact  
18 that if there are evidentiary issues that need to be  
19 addressed outside the presence of the jury, we could  
20 do that during lunch break or come in early.

21 THE COURT: All right. You want to use a  
22 traditional schedule?

23 MR. GORENCE: That's okay, Your Honor.

24 THE COURT: All right. So we'll ask you to  
25 be here on Monday at 8:30. We'll try to have the

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1       jury in here at 9:00. We'll break for lunch, and  
2       we'll close -- we'll shoot for 5:00. If the case  
3       isn't moving rapidly, and we're not staying on-track,  
4       then, if we need to, we'll work till 5:30.

5                   Openings: What's the length of your  
6       opening and who will be making it? I put you in  
7       there, Ms. Neda, so how long will your opening last?

8                   MS. NEDA: Less than 30 minutes. So I'll  
9       put a 30-minute limit on it.

10                  THE COURT: Okay. Mr. Gorence.

11                  MR. GORENCE: Ms. Oliveros will be opening,  
12       Your Honor, and I would anticipate all of 30 minutes.  
13       And I'd ask for 40, just to be safe, if we're on a  
14       clock.

15                  THE COURT: All right. You don't have to  
16       tell me if you don't want to, but it helps make -- as  
17       far as the preliminary instruction, do you expect to  
18       make your opening at the beginning?

19                  MR. GORENCE: Yes, Your Honor. There is no  
20       doubt that will occur.

21                  THE COURT: Okay. The defendant is not in  
22       custody, so I don't have to worry about those issues.

23                  Exhibits: Any issues with exhibits that we  
24       need to discuss, Ms. Neda?

25                  MS. NEDA: Yes, I did e-mail some

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1       objections to exhibits of the defense pursuant to our  
2       deadline. I didn't get any objections from the  
3       defense for ours. But with respect to theirs, one is  
4       Facebook screen shots from the victim's Facebook, and  
5       I would object to it.

6                   THE COURT: I'm not sure I got the  
7       objections to --

8                   MS. NEDA: No, they were to be shared  
9       amongst --

10                  THE COURT: So y'all just made an informal  
11       objection?

12                  MS. NEDA: Well, I interpreted the order to  
13       be that we should exchange objections to see what we  
14       could stipulate to. With respect to Exhibit I, I did  
15       communicate by the deadline that I object to Exhibit  
16       I, because all it is is --

17                  THE COURT: I'm not even sure I have --  
18       okay. I do have the defendant's exhibit list. So  
19       Exhibit I is the only one you have an objection to?

20                  MS. NEDA: They've produced the other two  
21       that I had objections to. I don't have -- well,  
22       let's address Exhibit I. And I'm going to bring it  
23       up to the Court since you don't have it; is that  
24       right?

25                  THE COURT: I don't have the exhibits.

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1 I've got an exhibit list.

2 MS. NEDA: Okay. Here is a notebook of the  
3 exhibits proposed by the defense.

4 THE COURT: Is that the only one you have  
5 an objection to is Exhibit I?

6 MS. NEDA: Yes, but I have to just address  
7 the other two in just a moment. But with respect to  
8 Exhibit I, I have a firm objection. And the Court  
9 can see what it is, is screen shots from the victim's  
10 Facebook. They don't pertain to this case in any  
11 way, shape, or form. They are poetry.

12 THE COURT: What do you --

13 MR. GORENCE: I plan on, Your Honor,  
14 without getting -- I don't know if I'm going to  
15 introduce them, but I certainly can confront  
16 Mr. Tafoya with questions about what he has posted,  
17 and statements. If there is an objection at that  
18 time to the question, I would anticipate the  
19 Government making that objection and the Court ruling  
20 on it. The only -- and this was submitted as an  
21 abundance of caution -- that if he denied statements  
22 that he wrote, I would plan on introducing them. At  
23 this point, I don't plan on introducing, depending on  
24 the answer. But I will at least in some of my  
25 questions to Mr. Tafoya, I want to -- he's made

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1 certain assertions in what the Government  
2 characterizes as poetry. I characterize it a  
3 different way. But anyway, I plan to ask him certain  
4 questions, and if he denies it, then I would confront  
5 him with his own statements from Facebook.

6 THE COURT: Well, let me have Ms. Wild make  
7 a copy of this. I understand the issue.

8 MS. NEDA: Well, I didn't articulate it  
9 completely, but it obviously would be hearsay if it  
10 was introduced. But also relevance. It's completely  
11 irrelevant. It's poetry he would send out to friends  
12 on Facebook and get their feedback about poetry. I  
13 think what Mr. Gorence wants to do is take sentences  
14 from the poetry and ask the victim, isn't it true you  
15 feel this way or that way, which is not relevant to  
16 the case.

17 THE COURT: Well, let me make a copy of  
18 that, and --

19 MS. NEDA: Yes.

20 THE COURT: And then I'll review it. And  
21 it may or may not be relevant, but I probably can't  
22 make that determination without reviewing the  
23 document and seeing what the question is going to be.  
24 Any other issues with exhibits, Ms. Neda?

25 MS. NEDA: Let me just confirm because

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1 there is no identification. With respect to the  
2 phone records, it doesn't indicate who these are.  
3 That's Exhibit G.

4 MR. GORENCE: Your Honor, these were  
5 produced by the Government, Verizon. I've stipulated  
6 to the authenticity of the phone records. They  
7 pertain to Mr. Rodella's phone, Undersheriff Crespin.  
8 And the Bates stamps are on there -- and I know the  
9 Government has subpoenaed these -- and with the  
10 numbers I'm fairly confident, given that they gave  
11 them to us to begin with that, they know who they  
12 belong to, and they will be authenticated for the  
13 jury. If the Government wants, we'll put them all  
14 in. But these are the relevant time periods and the  
15 relevant dates. That's Mark Thompson's phone --

16 MS. NEDA: I don't object to that. My  
17 question was that in the defense exhibit list, I  
18 believe they said Jake Arnold's phone. And we did  
19 not obtain the Verizon records for Jake Arnold's  
20 phone. But these are the ones disclosed to you.  
21 There is no objection.

22 MR. GORENCE: I think they're all Bates  
23 stamped, Your Honor. And I don't know if  
24 Mr. Arnold's phone will be appropriate. At this  
25 time, I don't know if I'll be introducing those. But

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1 we have the Sheriff's, Mr. Thompson's, Mr. Crespin's,  
2 and Randy Sanchez. And I think the Government has  
3 all those. These are records that we obtained from  
4 them.

5 MS. NEDA: Absolutely. And we do not  
6 object to that. It's just that it says -- in the  
7 exhibit list, it doesn't say that. It says Jake  
8 Arnold's phone.

9 Now, with respect to Government's Exhibit  
10 H, it is the dispatch logs. Defendant's Exhibit H,  
11 these are dispatch logs. I have no problems having  
12 somebody describe this, but I know that an  
13 explanation is required just to introduce these into  
14 evidence. And make argument based simply on the  
15 documents without explanation, I think is -- would  
16 lead to confusion. So I think a foundation witness  
17 needs to be provided to explain how the information  
18 is entered. I know that even we, as we studied this,  
19 realized that it isn't what it appears to be on its  
20 face. And you do have to interview the various  
21 dispatch personnel to get an explanation of that. So  
22 I don't have a problem with testimony about this and  
23 even the admission of this record, provided there is  
24 a foundation made via an explaining witness.

25 THE COURT: Do you intend to have somebody

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1 provide a foundation on that?

2 MR. GORENCE: Again, Your Honor, this was  
3 produced by the Government, but I'll amend our  
4 witness list to call the dispatcher for that  
5 foundation that the Government wants, Ms. Quintana.  
6 And I will do that today to accommodate the  
7 Government's concerns about how the document is  
8 created.

9 And I understand now, because there is a  
10 lot of information on that, as it pertains to towing  
11 records, and I think the Government is now clued into  
12 that. But I will amend the witness list to bring the  
13 dispatcher.

14 THE COURT: All right. Ms. Neda, do you  
15 have any other issues?

16 MS. NEDA: No. But Ms. Quintana, if you  
17 notice on our witness list, we are bringing her, and  
18 she could speak to where her entries are. She's not  
19 the only one that's on this. That's all I need to  
20 mention. And we're not intending to bring anybody  
21 but Ms. Quintana.

22 THE COURT: Is she a dispatcher?

23 MS. NEDA: She is, and she's on the  
24 dispatch log along with others.

25 THE COURT: Is that sufficient that you put

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1 your exhibit in through her?

2 MR. GORENCE: I will. I'm just always --  
3 if for some reason they don't call her, I better have  
4 her under subpoena. Unless the Government is making  
5 an ironclad representation she'll be here, then I  
6 won't go to the trouble. And maybe that would be a  
7 lot easier because that would accommodate at least  
8 describing the process for how a dispatch computer --  
9 well, computer assisted dispatch, a CAD, is created.  
10 So if they're going to call her, then I won't, and we  
11 can take care of this authentication issue.

12 MS. NEDA: All right. And Exhibit J -- I'm  
13 sorry, yeah, J -- Defense Exhibit J -- I guess we  
14 have no objection. We originally objected because we  
15 didn't have a copy of it. We now do. So there is no  
16 objection to Exhibit J, Your Honor.

17 The final objection is if the defense  
18 intends to offer the original indictment into  
19 evidence, and, of course, we would object to that.

20 MR. GORENCE: Your Honor, this will be --  
21 and I think it was clear -- as well as the dismissal  
22 against Thomas Rodella, Jr., and it would only come  
23 in with regard to Thomas Rodella, Jr., his motive and  
24 bias, the fact that he was first accused of  
25 wrongdoing, then dismissed. And I can pull the case

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1 law, but the fact that he was charged by the  
2 Government then dismissed will be relevant for the  
3 jury to evaluate his credibility. And that's the  
4 only way it could come in. I don't have a problem  
5 with a limiting instruction in terms of it doesn't --  
6 it's only relevant to Tommy Rodella's Jr.'s  
7 credibility; that he was charged, arrested; the  
8 Government moved to detain him, and keep him in jail.  
9 That's a matter of public record. When they filed  
10 that on August 15, he was released. But that is  
11 relevant to his credibility, Your Honor, and that's  
12 the basis for it.

13 THE COURT: How does that help you? Why  
14 would you want to introduce that?

15 MR. GORENCE: Your Honor, I appreciate  
16 maybe the Court's more experienced. But I think it's  
17 relevant that the jury understands that he was a  
18 defendant in this case, and dismissed. The  
19 Government can get into their reasons; they can ask  
20 about his -- and I'm talking about his illustrious  
21 war record. We'll get into his service-connected  
22 injury, and all of that. But I do want to show that  
23 the Government charged him, because that's the truth  
24 in this case. And it will give the jury the full  
25 feel and flavor that if he has any animus towards the

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1       Government, that would be important for the jury to  
2       assess.

3                   MS. NEDA: Your Honor, it's not relevant,  
4       and Mr. Gorence doesn't get into the background of  
5       Mr. Rodella, Jr. So everything Mr. Gorence has just  
6       discussed is wholly irrelevant. Obviously, the  
7       indictment is not admissible. And with respect --

8                   THE COURT: Are you calling Rodella, Jr.?

9                   MS. NEDA: No. It's on the defense witness  
10      list.

11                  THE COURT: I guess if he wants to impeach  
12      his own witness, it's his business, isn't it?

13                  MS. NEDA: And you know the reason why it  
14      was dismissed -- I don't know that we need to discuss  
15      it in open court right now -- with respect to Mr.  
16      Thomas Rodella, Jr., but it had nothing to do with  
17      the defendant not being culpable. So that's why it's  
18      irrelevant. And plus, an indictment should never be  
19      in evidence, as the jury is going to be instructed by  
20      you, sir, in the jury instructions. The jury is  
21      going to be instructed that an indictment is not  
22      evidence. How conflicting it would be if an  
23      indictment was actually admitted into evidence for  
24      them, as a piece of evidence for them to consider.

25                  And then I just noticed that attached to

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1 this indictment is the United States' unopposed  
2 motion to dismiss Mr. Rodella, Jr. The United  
3 States' motion is a piece of evidence? Since when?  
4 And if it is, why wouldn't you put in all the motions  
5 which lay out this case very nicely. But, of course,  
6 it is not evidence. We're trying to make sense out  
7 of nonsense. These items are not evidence. They're  
8 not relevant. They are hearsay. And there is a lot  
9 of background behind both these -- this event -- that  
10 doesn't necessarily have to be put into the court,  
11 into the trial.

12 THE COURT: Well, I'm not sure the issue.  
13 I mean, if anything, it seems to me that the  
14 Government might have an interest in talking about  
15 the fact that, if Rodella, Jr. testifies, that he was  
16 indicted in this case. So I'm a little confused  
17 about who is fighting over what here.

18 But anyway, I think the issue is probably  
19 relevance. Do we need to get the indictment in? The  
20 reason I'm concerned about the indictment, it  
21 contains additional counts against Mr. Rodella, Sr.  
22 And I'm wondering if that should not be in front of  
23 the jury, because we want them to focus on the  
24 indictment that I will give to them.

25 MR. GORENCE: Well, Your Honor, I think

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1 that's all handled by a limiting instruction. And I  
2 won't be arguing that the indictment now was  
3 dismissed with regard to certain counts. I know --  
4 and I can get the case law -- in terms of a charge  
5 against a witness is always relevant to show motive  
6 and bias. And when it's dismissed -- and I most  
7 certainly, in credentialing this witness --

8 THE COURT: I'm just wondering if the  
9 indictment itself needs to come into evidence. I'm  
10 not saying keep it out as far as your questioning  
11 Rodella, Jr. But it also contains additional charges  
12 against Rodella, Sr.

13 MR. GORENCE: Well, Your Honor, I think the  
14 Government has got an issue on penalties. And I  
15 don't plan on getting into the specific time counts  
16 of each thing that Mr. Rodella faced. Because, as  
17 you would with a cooperating defendant, you can show  
18 what he would have faced, and what he's now  
19 potentially facing by virtue of the benefit. But I  
20 do want to show that he was charged in a conspiracy  
21 with his father. I want to show that he was charged  
22 in falsifying --

23 THE COURT: Well, I'll look at your cases.  
24 But give some thought to whether all that can be --  
25 I'm sure Rodella, Jr. is going to give you the answer

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1 you want. So you can probably say, Weren't you  
2 charged with a conspiracy, and all that, without  
3 maybe the additional charges against Rodella, Sr.  
4 coming in, and the jury setting there thinking about  
5 those.

6 MS. NEDA: Your Honor -- and I would ask  
7 the Court to reserve its ruling on this, and require  
8 a showing by Mr. Gorence -- because I am absolutely  
9 certain that there will be no support for admitting  
10 an indictment into evidence. It would open up a  
11 whole can of worms.

12 THE COURT: I'll look for your -- if you  
13 want to give me some law on that, I'll be glad to  
14 look at it.

15 MR. GORENCE: I'll do that, Your Honor.  
16 And I do want to --

17 MS. NEDA: And the motion, and the --

18 THE COURT: Hold on, hold on. I'm going to  
19 have to talk to you both about court etiquette here,  
20 okay? Yesterday -- and you've done it again today --  
21 you continue to interrupt me. And that's going to  
22 probably at some point boil over, and I'll have to  
23 call you down in front of the jury. So let's start  
24 today.

25 MS. NEDA: All right.

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1                   THE COURT: Watch me. If I'm talking, you  
2 stop. Y'all talk to the Court; don't talk to each  
3 other. I'm usually pretty good about prompting you:  
4 Thank you, Ms. Neda; thank you, Mr. Gorence. You  
5 know when you're over. When Mr. Gorence is up here  
6 arguing, don't you be making comments about it. But  
7 let's use normal court etiquette.

8                   All right. What other issues do you have  
9 on exhibits?

10                  MS. NEDA: Well, in addition to the  
11 indictment, Your Honor, I was also mentioning that  
12 there is a motion.

13                  THE COURT: I understand.

14                  MS. NEDA: Okay. So that, as well, is  
15 being objected to.

16                  THE COURT: I understand the issue.

17                  MS. NEDA: Now, with respect to any of the  
18 other exhibits, they're just all hearsay. For  
19 instance, the written report from the Rio Arriba  
20 County Sheriff's Office, the investigative report.  
21 That doesn't come in, it's hearsay. The witnesses  
22 will testify to how they conducted their  
23 investigation. But their actual report is not  
24 evidence. There are statements, very self-serving,  
25 written by the defendant about what transpired.

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1 That's Exhibit A. I don't know if the Court has  
2 these exhibits. Exhibit A, for instance, starts off  
3 on this first page, is the supplemental prepared by  
4 Vince Crespin, which parrots the --

5 THE COURT: Well, I'm not sure this is very  
6 profitable. We'll just skip exhibits. We'll just  
7 argue them one at a time at trial.

8 MS. NEDA: All right.

9 THE COURT: I thought there might be some  
10 way to assist with exhibits. I'd understood that you  
11 had one objection on Exhibit I, about the Facebook.  
12 And now it's going through every one of the exhibits.  
13 And that's not what I had in mind.

14 Is there any exhibits -- any issues with  
15 exhibits that I can help with on your side, Mr.  
16 Gorence?

17 MR. GORENCE: Your Honor, we've objected to  
18 the Government's exhibits pertaining to the SOPs, and  
19 training manuals, and the rest of them. And what I'd  
20 like to do is, I will get -- some of these have to do  
21 with foundation, and that's what Ms. Neda is really  
22 talking about. I don't want to stipulate at this  
23 point, because I don't know. But what I will do by  
24 the end of the day is I will indicate and copy the  
25 Court on what we will stipulate prior to the start of

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1 the trial. And to be candid, I think it's going to  
2 be the majority. I've got one -- most of the  
3 photographs. I know that there are phone call logs,  
4 but again, I'm waiting to see how they're  
5 authenticated. So, Your Honor, I think it would be  
6 best -- I will send an e-mail, then we handle them  
7 one by one that we can't agree to.

8 THE COURT: All right. Are there any  
9 issues or disputes with witnesses that I need to deal  
10 with other than what we're going to have to deal with  
11 as far as experts this morning, Ms. Neda?

12 MS. NEDA: Yes, Your Honor. I filed a  
13 motion, it's Document 68, objection to the defense  
14 failure to name its witnesses in a timely fashion by  
15 the Court's deadline. I mean, I understand that  
16 sometimes you have to amend --

17 THE COURT: Well, I thought we dealt with  
18 Gail at the last hearing. Is there anything to add  
19 on Gail?

20 MR. GORENCE: No, Your Honor. And I still  
21 have an investigator pursuing that. And I understand  
22 the Government's concern. I would ask that if I have  
23 an amended with a name -- and I'd like to have till  
24 Thursday -- let's see, it's Tuesday -- Thursday by  
25 5:00 -- then I won't be calling her. I'm not going

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1 to surprise at the last minute with a witness  
2 unless -- and I think rebuttal witnesses are always  
3 apropos. If Mr. Tafoya were to deny something, I can  
4 always call a witness, even someone not on the  
5 witness list, to impeach a Government witness. And  
6 so what I'm saying is I don't intend on calling her,  
7 if I haven't got her.

8 On the other hand, I think the Court's well  
9 aware -- this is a court rule, it's not a rule of  
10 criminal procedure -- we're complying with the  
11 Court's rule. But it certainly doesn't limit the  
12 defense from calling impeachment witnesses.  
13 Obviously, I've seen Mr. Tafoya's report, but I've  
14 never talked to him. He won't talk to -- so my first  
15 opportunity to really hear what he's going to say  
16 under oath is when I cross-examine him. And if he  
17 says something that contradicts what he's told  
18 someone else, I believe the Court's scheduling order  
19 doesn't preclude us from coming in and calling a  
20 rebuttal witness.

21 THE COURT: Well, make sure that it's a  
22 true rebuttal witness. Make sure that it cannot be  
23 anticipated. So if you know right now you're going  
24 to have to impeach Mr. Tafoya, and you know you're  
25 going to impeach him with another witness, identify

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1 that person now, and be prepared to call it -- well,  
2 obviously in your case-in-chief, but make sure it's a  
3 true rebuttal witness.

4 MR. GORENCE: Yes, sir, Your Honor.

5 THE COURT: Other than Gail, is there  
6 anything I can really do with the objections?

7 MS. NEDA: Well, Your Honor, as my  
8 objection states, Witness No. 19 is actually -- is an  
9 infinite series of witnesses. It says any witness  
10 who deals with discovery.

11 THE COURT: Well --

12 MR. GORENCE: Your Honor, I'll retract  
13 that. I think the idea is to avoid surprises. And  
14 if we have received information from the Government,  
15 it's certainly no surprise. And I know that's a  
16 civil response.

17 THE COURT: Yeah. Let's just not rely upon  
18 that one. So if you've got a witness, even if it's  
19 been disclosed in discovery, why don't you get that  
20 and file an amended trial witness list.

21 MR. GORENCE: Yes, Your Honor.

22 THE COURT: All right. Anything else on  
23 exhibits or witnesses, Ms. Neda?

24 MS. NEDA: Has the Court -- I want to make  
25 clear on the order, Mr. Gorence is to disclose the

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1 identity of any other witnesses he can on Thursday?

2 THE COURT: Is that right?

3 MR. GORENCE: I've committed to that, Your  
4 Honor.

5 THE COURT: Anything else, Ms. Neda?

6 MS. NEDA: With respect to pretrial issues?

7 THE COURT: No, just witnesses.

8 MS. NEDA: Oh, witnesses. No, sir.

9 THE COURT: All right. How about you, Mr.  
10 Gorence, anything further?

11 MR. GORENCE: No.

12 THE COURT: Are there any discovery issues  
13 outstanding I need to deal with, Ms. Neda?

14 MS. NEDA: Discovery on the part of the  
15 United States, no. We disclosed everything. And I  
16 believe Mr. Gorence has now disclosed all his  
17 exhibits.

18 THE COURT: Any discovery issues, Mr.  
19 Gorence?

20 MR. GORENCE: The only thing is what I  
21 raised yesterday, Your Honor. Some research is still  
22 continuing. I believe the Government has an  
23 obligation to turn over communications to the State  
24 Police to the extent it relates to an explanation for  
25 a doctored report, as we heard, then we'll follow-up

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1 on that today at 11:00. I believe that it's  
2 relevant. It might not be a witness statement, but,  
3 as I said, research is continuing as to whether  
4 Mr. Howard, seated in the back, will be called. And  
5 if need be, we have to go through a CFR procedure,  
6 which has to be served in D.C., so that wouldn't  
7 happen today with Mr. Howard.

8 But I think fundamental due process, now  
9 that we've heard the testimony yesterday, as  
10 conflicting as it was between Sergeant Olson and  
11 Patrolman Orlando Sanchez, and we'll see how that  
12 transpires. But I have a discovery request that I've  
13 made that the Government turn over any and all  
14 information to the extent it exists with regard to  
15 FBI or U.S. Attorney communication to the State  
16 Police requesting them to change a document.

17 So I've made that on the record. There  
18 isn't a motion, but I will call it an oral motion in  
19 court. And I believe that it is exculpatory and  
20 needs to be turned over pursuant to Brady versus  
21 Maryland on this issue regarding the recusal of the  
22 U.S. Attorney.

23 THE COURT: Mr. Pena, do you want to  
24 respond or anything?

25 MR. PENA: Of course, the United States is

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1       fully aware of its Giglio obligations. If we had any  
2       awareness of something like that existing, we would  
3       have turned it over long ago. But we will continue  
4       to maintain --

5                   THE COURT: So you don't think there is any  
6       FBI or U.S. Attorney's communications or documents  
7       that indicate communications between the U.S.  
8       Attorney's Office and the FBI about charges in state  
9       court?

10                  MR. PENA: Absolutely not, to my knowledge,  
11       Your Honor.

12                  THE COURT: All right. I've got your  
13       instructions. And I'll try to get you a final set.  
14       By that, I don't mean that it won't be subject to  
15       revision. I just mean it will be the final jury  
16       instructions. I'll try to get that to you this week  
17       so that you can start looking at it and making  
18       comments or suggestions.

19                  Other than the motions that we have to deal  
20       with today, any other motions in limine anybody  
21       anticipates filing, Ms. Neda?

22                  MS. NEDA: Not at this point. There is a  
23       couple pending matters that we still need to address.

24                  THE COURT: All right. And you don't  
25       expect anything further?

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1                   MR. GORENCE: Nothing additional. The only  
2                   thing I would like to return to, Your Honor, is that  
3                   and I know you told us -- I don't have a copy, a  
4                   transcript of our hearing before on the voir dire --  
5                   the Court will be handling issues related to APD  
6                   excessive force, and you'll be handling all of the  
7                   publicity related issues.

8                   THE COURT: What my memory is -- and I  
9                   talked to Ms. Wild about this -- because of the  
10                   commitments we made to the length of the voir dire  
11                   earlier is that y'all were going to -- I think you  
12                   were the one that wanted me to handle some of those  
13                   questions. And my recollection is Ms. Neda didn't  
14                   have any objection to the Court asking those  
15                   questions. You were going to supply Ms. Neda with a  
16                   list of those questions. If y'all are in agreement,  
17                   then give those to me. And then those are the ones  
18                   that I was going to go over in addition to the ones  
19                   that I normally go over. So --

20                   MR. GORENCE: With that, Your Honor -- and  
21                   I haven't -- in fact, I thought the Court was going  
22                   to handle that -- I haven't done that procedure.  
23                   What I will do is get those questions to Ms. Neda. I  
24                   know we're going to be here all day, and my partner  
25                   is on a flight to Philadelphia. But I will have them

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1 to Ms. Neda by 10:30 tomorrow morning. And again,  
2 some of this -- they're just generally broad  
3 questions. The publicity, I'm assuming the Court's  
4 going to handle.

5 THE COURT: The publicity, I'll handle up  
6 here at the bench, so I'll handle that.

7 MR. GORENCE: So I don't have to have draft  
8 questions?

9 THE COURT: I guess the questions that I  
10 was remembering that you were interested was the APD  
11 and excessive force issues. And I'd like to see  
12 y'all talk about that and see exactly what you want  
13 the Court to ask on that.

14 MR. GORENCE: I will have them over to Ms.  
15 Neda tomorrow by 10:00, Your Honor.

16 THE COURT: If there is no objection to  
17 those, the Court will just include those as part of  
18 its questioning.

19 We've got the Daubert issues this morning.  
20 Anybody expect any further Daubert issues to be  
21 raised, Ms. Neda?

22 MS. NEDA: No, Your Honor.

23 THE COURT: Mr. Gorence?

24 MR. GORENCE: No, Your Honor.

25 THE COURT: I proposed to use, in talking

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1 to the jury on Monday about the case description,  
2 statement of the case, just to use the indictment --  
3 superseding indictment, use that then to find out if  
4 anybody knows about the case. Anybody want to do  
5 anything different on that, Ms. Neda?

6 MS. NEDA: No, Your Honor.

7 THE COURT: Does that work for you, Mr.  
8 Gorence? That's what I'll do. I've looked at the  
9 proposed voir dire. Do you have any objection to the  
10 Government's proposed voir dire?

11 MR. GORENCE: I don't.

12 THE COURT: Do you have any to the  
13 defendant's proposed voir dire?

14 MS. NEDA: I don't.

15 THE COURT: I've talked about witness list,  
16 jury list. If you need any further technology for  
17 the courtroom, let Ms. Wild know.

18 The trial I was going to have this week  
19 cleared up because of a Daubert hearing, so if you  
20 need to come in and set anything up, Ms. Wild can  
21 help you get in here and work with our IT people.

22 Generally, I have Ms. Wild put on the Elmo  
23 a copy of the preliminary instructions and the final  
24 instruction, so the jurors can read along with us as  
25 I read them. Is that acceptable, Ms. Neda?

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1 MS. NEDA: That's fine, Your Honor.

2 THE COURT: Mr. Gorence?

3 MR. GORENCE: Yes, Your Honor.

4 THE COURT: And I'll also give a copy of  
5 the jury instructions to each one of the jurors so  
6 that they have it when they go back to deliberate.  
7 Is that acceptable?

8 MS. NEDA: Yes, sir.

9 THE COURT: Mr. Gorence, is that okay?

10 MR. GORENCE: Yes, Your Honor.

11 THE COURT: How long do you think your  
12 closing will last? Who will be giving it?

13 MS. NEDA: I'll be giving it. About an  
14 hour, and I'll probably split it 50/50.

15 THE COURT: All right. Mr. Gorence?

16 MR. GORENCE: An hour; I'd ask for an hour  
17 and ten minutes, actually. No more than that. And I  
18 will be giving it.

19 THE COURT: All right. Let me return now  
20 to the issue at the very beginning. Y'all think you  
21 can get this case done in five days, or am I  
22 shortchanging anybody here?

23 MS. NEDA: I'm pretty brief, Your Honor. I  
24 think we can.

25 THE COURT: Mr. Gorence?

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1                   MR. GORENCE: Even with what I said might  
2 be expanded, I heard the Court, we're going to  
3 finish. We'll work hard.

4                   THE COURT: I'm backtracking. If you can't  
5 get it down in five, I don't want anybody to walk out  
6 of here -- I don't want to put unreasonable limits on  
7 it. But I need to plan the next week. I'm also  
8 thinking about what we tell the jury, so we don't end  
9 up with jury problems, if this thing were to drift  
10 over into the next week. I'd rather know that now,  
11 and deal with it now, rather than tell the jury we  
12 can get it done in a week, and then we can't, and  
13 then I've got jury problems on the following week.

14                  MS. NEDA: I do believe we can finish it by  
15 the end of the week, Your Honor.

16                  MR. GORENCE: Your Honor, what would help  
17 is how long the Government anticipates their  
18 case-in-chief. Now, I know they can't estimate  
19 cross-examination length. And I don't know if  
20 they're going to actually call everyone on their  
21 list. But I know Ms. Neda is very experienced. It  
22 would help me, because I think our case will take at  
23 least a day, and probably a day and a half. So I can  
24 really answer that question better if the Government  
25 could estimate what it does have control over, which

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1 is how long do they think -- I mean, jury selection  
2 and openings, and given there has been some  
3 publicity. But you know, if we get jury selection,  
4 openings, maybe start a witness on Monday, does the  
5 Government really anticipate that they can then put  
6 their case on in two days, all day Tuesday, all day  
7 Wednesday? If they go much longer than Thursday at  
8 noon, then we won't finish with the defense  
9 presentation of evidence.

10 If there is any -- hopefully, we can work  
11 out jury instruction issues beforehand and close. So  
12 my concern is if the Government recesses at the end  
13 of Thursday, then, because they take three days, in  
14 essence, to put their case on, then we won't finish.  
15 That's my inquiry is how long do they think it will  
16 take to put their case-in-chief on.

17 THE COURT: Do you have an estimate, Ms.  
18 Neda?

19 MS. NEDA: I am brief. But I don't know  
20 how long cross will be. If they match my brevity,  
21 then I say two, two-and-a-half days, most.

22 THE COURT: What do you think, Mr. Gorence?

23 MR. GORENCE: Well, if it's two-and-a-half  
24 days, as I said -- and we -- I'm really not counting  
25 Monday, because I anticipate there could be -- and I

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1 know what happens with the publicity issue; that  
2 really slows down a voir dire, in my experience, when  
3 you have to take individual members of the panel, go  
4 to the bench, and have the required questions: What  
5 did you hear or see or learn; from what source;  
6 feelings about it; and then the ultimate, can you set  
7 it aside? And if there is a panel -- and I've seen  
8 the panel in terms of the length -- you know, jury  
9 selection could be an all-day affair, if there is a  
10 lot of response to that, or people that have heard  
11 about this case or other aspects of -- you know,  
12 anything else about Sheriff Rodella, know his wife,  
13 who is a state representative.

14 So worst case scenario, if we have all  
15 day -- and I don't think it will take longer than a  
16 day -- but if we take all day, and then openings at  
17 the length that we have estimated, and then the  
18 Government takes two-and-a-half days, that puts us  
19 Thursday, noon-ish, before we even start.

20 So I think a full week -- we won't get it  
21 done earlier than the week. And I think the distinct  
22 possibility is that they'd be deliberating even the  
23 next week. I just throw that out there.

24 Two-and-a-half days, and we have a full day on jury  
25 selection, puts us mid-Thursday. And that will be

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1 hard pressed to finish by Friday.

2 THE COURT: All right. Well, think about  
3 it during the day, and I'll probably come back to  
4 this question at the end of the day, so that we get a  
5 little bit firmer idea. Maybe some of the rulings  
6 today will give you a little better idea, and you can  
7 give me an estimate at the end of the day. Because I  
8 think we've got to figure out what we're going to  
9 tell the jury about how many days we're anticipating  
10 this is going to take, or otherwise, we're not going  
11 to get a firm sense from them as to whether they're  
12 available for all those days.

13 All right. Let me go back. This will be,  
14 I guess, the final issue, then I'll let you raise  
15 some issues, if you have them. On the exhibit list,  
16 you were talking to Ms. Neda about Exhibit A having  
17 hearsay. Anything else you want to say about the  
18 exhibits, other than the reports may contain hearsay  
19 and not be admissible?

20 MS. NEDA: If we're handling them now, the  
21 main objection to introducing investigative reports  
22 would be hearsay.

23 THE COURT: Okay. Anything else you want  
24 to say on the exhibit list, the defendant's exhibit  
25 list?

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1 MS. NEDA: That's the same objection I have  
2 on a couple of the others, because they're just  
3 reports and so forth: New Mexico State Police  
4 reports, the RASO reports, witness statements, rather  
5 than the witness themselves. So they are all  
6 hearsay. That would be my main objection.

7 THE COURT: Do you intend to introduce  
8 those or just use them for cross?

9 MR. GORENCE: Your Honor, I agree. The  
10 statement alone cannot come in unless there is a  
11 foundation. The declarant, the person who wrote the  
12 statement has to be there. It may be assuming they  
13 testify. There are different issues, whether it  
14 actually comes in, is used to refresh recollection.  
15 But I understand what Ms. Neda is saying. I'm also  
16 saying I know they don't come in by themselves. The  
17 difference, however, is I do intend to introduce both  
18 versions of the State Police documents to show -- and  
19 the testimony we heard yesterday, and I know they  
20 won't be offered for the truth, but the fact that  
21 there were these machinations going on, and changed  
22 reports from what was -- you heard the testimony.

23 But I will most definitely, and the  
24 Government knows, I have put Patrolman Sanchez,  
25 Lieutenant Olson, and I know that Lieutenant Skinner,

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1 Captain Thornton, and the Chief of Police, Mr.  
2 Kassetas, were all served either last night or this  
3 morning. And they'll be here. And I may be amending  
4 my witness list in terms of what they say.

5 But so what I'm saying is with Exhibit A,  
6 with Vince Crespin, he's on our witness list. I  
7 understand it's hearsay; it may be relevant once he  
8 testifies. As a stand-alone document, it could never  
9 come in. It is hearsay.

10 The State Police reports, that's a totally  
11 different matter, in terms of what we've begun to  
12 unearth yesterday. And I will be introducing both of  
13 those.

14 THE COURT: All right. Anything else on  
15 exhibits, Ms. Neda?

16 MS. NEDA: With respect to what Mr. Gorence  
17 just discussed, I already had raised that that would  
18 be irrelevant as well. The only testimony thus far  
19 is that the Government had nothing to do with  
20 charging decisions.

21 THE COURT: All right. I think we covered  
22 all of your issues with the exhibits. You said most  
23 of them you were going to be sending over a letter,  
24 Mr. Gorence. So I'll wait and see what that says,  
25 unless you have something you want to raise about

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1 exhibits today.

2 MR. GORENCE: I don't, Your Honor.

3 THE COURT: Ms. Wild, can you think of  
4 anything else we need to cover?

5 THE CLERK: No, sir.

6 THE COURT: Mr. Pena, Mr. Gorence? You got  
7 your jury questionnaires? They were available  
8 yesterday to pick them up.

9 MS. NEDA: We have not seen them. We did  
10 order them.

11 THE COURT: They're available in the  
12 clerk's office. Mr. Pena, Mr. Gorence, Ms. Oliveros  
13 have all tried cases in front of me. Ms. Neda, you  
14 haven't. Are there any particular questions you have  
15 that you want to ask the Court about how I conduct  
16 things? Any questions or issues?

17 MS. NEDA: No, sir.

18 THE COURT: And Mr. Pena, do you have any?

19 MR. PENA: No, sir.

20 THE COURT: Mr. Gorence, anything else you  
21 want to raise about the trial?

22 MR. GORENCE: I've had a few with you, Your  
23 Honor, and I think I know how the Court works.

24 THE COURT: All right. Let's then take  
25 up -- you had an expert, Mr. Gorence, that I think

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1       needed to get out of here. So do you want to take  
2       your motion up first, your expert?

3                    MR. GORENCE: Yes, Your Honor. This is --  
4        we have noticed Dr. Harvey Stanford Sanders. He's  
5        here, and I will call him, Your Honor.

6                    THE COURT: All right. Dr. Sanders, if  
7        you'll come up. Is there any reason to invoke the  
8        rule this morning?

9                    MR. GORENCE: No, Your Honor.

10                  THE COURT: Mr. Pena, Ms. Neda?

11                  MR. PENA: No, sir.

12                  THE COURT: Dr. Sanders, if you'll raise  
13        your right hand, Ms. Wild will swear you in before  
14        you're seated.

15                  HARVEY STANFORD SANDERS, M.D.,  
16        after having been first duly sworn under oath,  
17        was questioned and testified as follows:

18                  THE CLERK: Please be seated. State your  
19        name for the record, please.

20                  THE WITNESS: You might excuse me, Your  
21        Honor. You might want to speak up, I wear hearing  
22        aids, and I have a sensory neural type of loss.

23                  MR. GORENCE: I will do that.

24

25                  DIRECT EXAMINATION

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1 BY MR. GORENCE:

2 Q. Doctor, would you state your name for the  
3 Court.

4 A. My full name is Harvey, H-A-R-V-E-Y,  
5 Stanford Sanders.

6 Q. Are you a medical doctor, Dr. Sanders?

7 A. I'm a medical doctor.

8 Q. Would you tell the Court a little  
9 background? I want to start, where did you go to  
10 college?

11 A. I went to college at Rhodes College, a  
12 small liberal arts college in Memphis, Tennessee, and  
13 received a bachelor's degree in English and biology.

14 Q. Rhodes? Was that also called Memphis  
15 College?

16 A. Rhodes at Memphis is the name of the  
17 college now.

18 Q. Oh, okay, I misunderstood.

19 A. When I attended in '63, it was called  
20 Southwestern.

21 Q. Okay. After you graduated -- and you said  
22 you had a agree in biology and English?

23 A. Correct.

24 Q. What did you do after that?

25 A. I went to medical school.

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1 Q. Where did you go to medical school?

2 A. I went to medical school at the University  
3 of Tennessee at Memphis, which is now known as the  
4 University of Tennessee Health Sciences.

5 Q. Did you graduate from the University of  
6 Tennessee at Memphis with a degree as a medical  
7 doctor?

8 A. I did.

9 Q. What year?

10 A. June 1967.

11 Q. After you graduated, what did you do?

12 A. I went to New Orleans, Louisiana, and for  
13 the first year I served a surgical internship. And  
14 then for the following four years, I served a  
15 complete general surgery residency. Following my  
16 general surgery residency, I went to the University  
17 of Chicago for the first year of training in plastic  
18 surgery.

19 Q. What year did you do that? And that's --

20 A. I beg your pardon?

21 Q. That's the Pritzker School of Medicine at  
22 the University of Chicago?

23 A. Pritzker School of Medicine at the  
24 University of Chicago.

25 Q. And you did a year residency in, you said,

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1 plastic surgery?

2 A. I did my first year of plastic and  
3 reconstructive surgery at the University of Chicago.  
4 My second year, my chief resident year, I did at  
5 Vanderbilt University in Nashville, Tennessee;  
6 Vanderbilt School of Medicine.

7 Q. And just by way of background, you did that  
8 first residency at the University of Chicago in '72  
9 and '73. And then you were at Vandy from '73 through  
10 '74?

11 A. That's correct.

12 Q. I'll speak up. I'm sorry, Mr. Sanders. Is  
13 that better?

14 A. That's okay.

15 Q. After you completed those residencies, did  
16 you commence the practice of medicine?

17 A. I did.

18 Q. Where?

19 A. In Nashville, Tennessee.

20 Q. Okay. Did you also -- were you in the  
21 Army, Dr. Sanders?

22 A. Only as a reservist. Was in Berry Plan 2,  
23 meaning that I got a deferral during the years of the  
24 Vietnam War, and then I had to serve six extra years  
25 in the Reserve program of the Army.

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1           Q.     Did you do those six years in Reserves in  
2     the U.S. Army?

3           A.     That's correct.

4           Q.     Did you do that as a medical doctor?

5           A.     I was in the U.S. Army Medical Corps,  
6     that's correct.

7           Q.     And you did that from '72 to '78?

8           A.     Actually, I was in that from -- in the  
9     Berry Plan from 1964, I guess, till 1978.

10          Q.     Were you honorably discharged, Dr. Sanders?

11          A.     Honorably discharged.

12          Q.     Now, you said you started your private  
13     practice of medicine in Nashville, Tennessee?

14          A.     That's correct.

15          Q.     How long did you stay in private practice?

16          A.     I was in private practice of plastic  
17     reconstructive surgery from July of 1974 until  
18     December of 2001.

19          Q.     At that point did you retire?

20          A.     Yes. Actually I was disabled. I sustained  
21     a rear end -- I was rear-ended by a lady talking on  
22     the cellphone. And when she did so, the whiplash  
23     gave -- it tore out the nerves to my rotator cuff.  
24     And I tried to stay in practice for three more years,  
25     but was unable to do so.

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1 Q. Did that have -- that accident have an  
2 effect on your ability to practice surgery?

3 A. It almost totally destroyed the ability to  
4 practice. I was essentially a one-armed plastic  
5 surgeon.

6 Q. Did that accident have any -- did it result  
7 in any cognitive impairment to you whatsoever?

8 A. No cognitive -- no cognitive disability at  
9 all.

10 Q. I just need to -- and obviously, it's very  
11 difficult, if not impossible, to be a surgeon absent  
12 one hand?

13 A. Exactly.

14 Q. After your retirement, did you move to New  
15 Mexico?

16 A. I did not move to New Mexico until 2008.

17 Q. Where do you now live?

18 A. I now live in Lyden, New Mexico.

19 Q. And where is that?

20 A. That would be about 13 miles north of  
21 Espanola.

22 Q. Do you still have a license? Do you still  
23 have a license to practice medicine?

24 A. My license is currently in the State of  
25 Tennessee.

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1           Q.    Okay.  Were you board certified,  
2   Dr. Sanders?

3           A.    No, I was not board certified.  There are  
4   some of us doctors, surgeons, who really don't  
5   believe in board certification.  However, I did pass  
6   the written part of both the surgery, general surgery  
7   and plastic surgery boards.

8           Q.    I have a CV that actually was typed by my  
9   office off of an e-mail -- and maybe I  
10   misunderstood -- because it says "board certified in  
11   surgery, board certified in plastic surgery."  Did  
12   you have those board certifications, or did I  
13   misunderstand you?

14          A.    No, I was not board certified.  I only  
15   passed the written examinations of both boards.

16          Q.    And you said there was a reason you decided  
17   not to do that?

18          A.    Yes, there was -- some of us think that an  
19   oral examination is more of a man-made examination.  
20   It's very difficult to ask another individual and to  
21   get a true answer, if you're not at a particular  
22   case.  In other words, an oral examination is more of  
23   how would you handle a laceration of the face, and  
24   would you give a general broad answer to that, to the  
25   latter.

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1                   MR. GORENCE: Your Honor, I want to  
2 amend -- we attached as Exhibit A to our notice a CV.  
3                   But this would have been -- as I said, it was  
4 prepared by my office. And I think I misunderstood  
5 an e-mail. So I would amend it to indicate that it  
6 says licenses and certifications at the bottom, as  
7 the doctor has now testified he was not board  
8 certified in surgery nor plastic surgery. So I want  
9 to bring that to the Court's attention.

10                  THE COURT: All right.

11                  Q. What about professional memberships and  
12 committees?

13                  A. I served on many committees for the  
14 Nashville Academy of Medicine. I was a member of the  
15 American Society of Plastic Reconstructive Surgeons  
16 of America. I was a member of the American Medical  
17 Association, Tennessee Medical Association, the  
18 Tennessee Plastic Surgical Association, the St.  
19 Thomas Hospital Association, Park View Hospital  
20 Association, the Baptist Hospital Association. And  
21 that's about all I was a member of. I was not a  
22 great joiner of professional organizations.

23                  Q. Have you ever lost your license or your  
24 privileges at any facility?

25                  A. Oh, no.

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1           Q. Doctor, would you define the different  
2 disciplines in both -- what's involved with plastic  
3 surgery, then you've mentioned another discipline,  
4 which is reconstructive surgery. Would you describe  
5 for the Court what those disciplines entail?

6           A. Plastic surgery is the discipline of what  
7 today we call cosmetic surgery. And over the years,  
8 plastic surgeons have evolved to the point that the  
9 vast majority do nothing other than cosmetic surgery.  
10 As a reconstructive surgeon, which I was trained to  
11 do, you might want to specialize in hand surgery,  
12 traumatic surgery of the face, head and neck cancer  
13 surgery, cosmetic surgery. In my particular case, I  
14 enjoyed the general practice of plastic surgery in  
15 all of these disciplines.

16           Q. Okay. Including reconstructive surgery?

17           A. Including reconstructive surgery. I never  
18 did less than 25 to 30 percent of reconstructive  
19 surgery in my practice.

20           Q. Okay. I want to go back and ask you  
21 questions, particularly as it relates to  
22 reconstructive surgery that is not cosmetic --

23           A. Sure.

24           Q. -- as it relates to facial injuries, facial  
25 bruising or facial trauma. So let me ask you, did

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1 you deal in your practice -- that spanned  
2 approximately 40 years, did it not?

3 A. If you include the residency, that's about  
4 right.

5 Q. Okay. Well, in your 40 years of practice,  
6 especially, as I said, with reconstructive surgery,  
7 did you have any experience in those areas I just  
8 said: Facial trauma, facial bruising, facial injury?

9 A. Virtually every week. I mean, I can't  
10 think of when you did not have an experience in  
11 evaluating bruising, discoloration, abrasions, that  
12 sort of thing.

13 Q. Okay. Let me ask the different types.  
14 When I use the word "facial injury" -- and you've  
15 talked about -- you said bruising, abrasion, swelling  
16 and did you say discoloration?

17 A. Sure.

18 Q. Are those all manifestations of facial  
19 injury?

20 A. They may be. Whenever you evaluate the  
21 face, you do it -- there are two points you consider.  
22 Number one, the possibility or the presence of  
23 physical trauma. And number two, one function of the  
24 face is to elicit the emotions of the individual. So  
25 you're always looking for the emotions of the

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1 individual, as well as any sign of physical trauma.

2 Q. Now, I want to go back. In your 40 years,  
3 can you approximate for the Court, either as a  
4 percentage of your practice or the number of cases  
5 that you dealt with about -- and I mean estimates,  
6 because obviously you have to ballpark a career of  
7 over 40 years -- but I need to quantify your  
8 experience. Other than just saying on a weekly  
9 basis, how much did you deal with patients that had  
10 facial injuries, as you've defined, whether it's  
11 abrasions, lacerations, swelling, discoloration,  
12 things of that -- how much did you deal with that?

13 A. From the time I began my plastic surgery  
14 residency until I retired, I can't remember any week  
15 that I didn't have some physical trauma patient in my  
16 office. If I had to quantitate it by percentage, I  
17 would say 20 to 25 percent of my practice was  
18 traumatic facial surgery.

19 Q. If I were to ballpark that, would that be  
20 hundreds of patients over 40 years with traumatic  
21 facial injury? Would that be 1,000 or more than  
22 1,000?

23 A. Over a lifetime, I did between 3 and 500  
24 major cases per year. I did that for 27 and a half  
25 years. You can figure that out. It will be

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1 somewhere around 15,000 cases. It would be over  
2 1,000, 1500 facial trauma cases in a lifetime for a  
3 plastic surgeon, which is a little more than most.

4 Q. Let me ask, by virtue of your training and  
5 experience, and then with the amount of practice  
6 you've had with facial injuries, do you have the  
7 expertise as a doctor to discern the various  
8 manifestations of a facial injury?

9 A. Certainly, I do.

10 Q. Explain that for the Court.

11 A. I'm not sure I understand.

12 Q. Well, what I'm saying is -- let me go back.  
13 If a patient had a bruise, a laceration, an abrasion,  
14 discoloration, would that be something that was  
15 significant to you in ascertaining before you started  
16 your course of treatment and/or surgery?

17 A. Oh, certainly. You'd take the history of  
18 the patient -- if I understand your question, you  
19 take the history of the patient, and you find out  
20 exactly what happened, when it happened, the  
21 circumstances under which it happened. And at the  
22 same time you're thinking about the emotions of the  
23 patient as you're looking at that face. You're also  
24 thinking about the function of the face as you're  
25 evaluating that injury. Does that answer your

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1 question?

2 Q. It does. And I'm using the word -- I guess  
3 the word I should use is a "history" of the patient.  
4 In taking that history and doing a physical exam,  
5 would it be important to you to determine the level  
6 of injury? In other words, ascertain whether  
7 bruising existed, lacerations?

8 A. Absolutely.

9 Q. Okay. And you have experience at that, as  
10 you've described to us?

11 A. Oh, yes.

12 Q. Now, did you have, in your practice,  
13 occasion to use photographs at all?

14 A. Oh, you photographed everyone you treated  
15 before and after.

16 Q. Okay. Well, I want to touch on that.  
17 Because in this case you never examined Michael  
18 Tafoya, did you?

19 A. No.

20 Q. Okay. But you saw a picture?

21 A. One picture.

22 Q. We're going to talk about that in terms of  
23 what you reviewed in a second. But before I get  
24 there, I want to get background information in terms  
25 of your use of photographs as a diagnostic tool and

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1 your experience with that. So maybe I'll be more  
2 specific. But let me start with how did you use  
3 photographs in your practice?

4 A. Okay. In every photograph, when you take a  
5 photograph of a face, as I said before, if it is from  
6 trauma, you're evaluating for physical trauma. You  
7 are always evaluating for emotional trauma, because  
8 that, again, is one function of the face is to reveal  
9 an individual's emotions. The first thing you do  
10 when you look at that photograph is to be sure it's  
11 not tampered. In other words, to be sure there is no  
12 blurring of the photograph; to be sure it's a true  
13 photograph.

14 The second thing you would look at would be  
15 the lighting. What's your light source? Is it from  
16 behind the patient, in front of the patient, maybe  
17 quartering the patient.

18 The third thing you would look for is the  
19 position of the face from the perpendicular plane.

20 And the last thing you would look for is  
21 the canting; in other words, the obliquity of the  
22 patient's face toward the camera.

23 Q. So you would use this photograph, and how  
24 would you use that, then, as a diagnostic tool?

25 A. Number one, you would look for unusual

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1 color.

2 Number two, you would look for swelling,  
3 realizing that if you bisect the face, you are not  
4 going to see total symmetry. The face, a normal  
5 face, shows about 90 percent symmetry. If you  
6 bisected the face and you made one photograph of one  
7 side, one photograph of the other, they would look  
8 like two similar individuals, but they would not be  
9 the same. So you're looking for symmetry, number  
10 one, okay?

11 You're looking for lighting. You're  
12 looking for any change in color. Although you're  
13 also remembering that that patient could be flushing,  
14 if you've never seen the photo, or that patient could  
15 be embarrassed. The patient could be shy. Or the  
16 patient could be angry, as I'm expressing right here.  
17 So you're examining all those variables. And from  
18 there you make your treatment plan.

19 Is there anything else?

20 Q. Well, no, but would you do that with every  
21 patient that had facial trauma prior to -- would you  
22 use a photograph as the diagnostic tool that you just  
23 described?

24 A. Oh, sure. I mean, before you operate on  
25 them, you use the photo for your plan of action -- I

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1 mean for your plan, your surgical procedure.

2 Q. So you did it in every case for 40 years?

3 A. Exactly, exactly.

4 Q. But in this case, Dr. Sanders, did I  
5 contact you -- and it's within the last 10 days --  
6 and did I -- whenever, a week ago -- and ask you to  
7 review any materials?

8 A. I believe you did on Saturday of last week,  
9 that's correct.

10 Q. And what were you provided with?

11 A. I was provided with one photo.

12 Q. A photo of Mr. Tafoya?

13 A. I wasn't given the name. I don't know who  
14 it was.

15 Q. Let me show you. Did you bring that with  
16 you, the materials you reviewed?

17 A. I do not have it.

18 MR. GORENCE: This has been marked on our  
19 exhibit list, Your Honor, part of the D series.

20 Q. But were you provided with a photograph?

21 A. That's the photograph.

22 MR. GORENCE: This is in D, Your Honor.

23 Q. What else were you provided?

24 MR. GORENCE: And for the record, that  
25 photograph is Mr. Tafoya. It was part of the booking

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1 records of Mr. Tafoya on March 11, 2014, the day of  
2 the -- as alleged in the indictment, Your Honor. The  
3 Government has a copy.

4 Q. What else were you provided with?

5 A. I was told that this photo was taken of an  
6 individual approximately five to five-and-a-half  
7 hours following incarceration.

8 Q. Okay. Did you -- were you provided with  
9 anything else? Did you see any badges of Sheriff  
10 Rodella, photographs of badges?

11 A. Yes, I also saw a badge of Sheriff  
12 Rodella's.

13 Q. Did you actually see the actual -- the  
14 badge he now has that replicates the badges that were  
15 seized by the FBI?

16 A. I did.

17 Q. Now, what was your methodology after you  
18 received the photograph as well as -- did you have  
19 anything else besides the badges, Dr. Sanders? Let  
20 me ask that question.

21 A. Well, when I examined the badge -- you're  
22 talking about the badge?

23 Q. Yeah.

24 A. When I examined the badge, I, of course,  
25 took my hand over it, examined it, turned it over,

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1 found it to be secure in a leather case, remarkably  
2 smooth. And actually what I did, I took the badge --  
3 and because the skin of the inner forearm is similar  
4 to the skin of the face -- I believe I read it in the  
5 paper that the badge had been slammed -- slammed  
6 against the patient's face. So I slammed the badge  
7 against my forearm. And then I slammed the badge  
8 against my other forearm. And when I say "slam," I'm  
9 73 years old, but I can give a pretty good lick.

10 Q. Every volunteer can.

11 A. I waited for five years -- I mean, five  
12 hours, and I really didn't see anything. It would be  
13 my contention that a slam by an adult man, with a  
14 patient in the prone position, with his head lifted  
15 back, would result in a pretty severe bruise,  
16 laceration; at the very minimal, an abrasion of some  
17 type.

18 Q. Okay. Well, let me ask on the photograph  
19 then -- and you've indicated previously an experience  
20 with discerning facial trauma of any kind --

21 A. Exactly.

22 Q. -- and use of photographs. So in this  
23 case -- and you described a methodology that you  
24 looked at. What was -- when you looked at the  
25 photograph of Mr. Tafoya, did you see any evidence of

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1       facial trauma, facial injuries, in the form of  
2       swelling, discoloration, abrasion?

3           A.    There was none.  And if I could see your  
4       photograph again.

5           Q.    It might be easier.

6           A.    Oh, great, thanks.  Okay, number one, the  
7       lighting is coming -- you can go ahead and back it up  
8       a little bit.  Okay, now, for everyone's convenience.

9                   And number one, the lighting is coming from  
10      the top of the patient, I'm going to guess at four to  
11      six feet, a little bit in front of the patient.  And  
12      there is almost total shadow on the left side.

13                   However, if you again bisect that face and  
14      you look for symmetry, you will see the symmetry of  
15      the entire face.  You understand my point, is well  
16      within 90 percent, okay?  Indicating a normal face,  
17      no evidence of facial fractures, no evidence of  
18      swelling, and no evidence of discoloration.  There is  
19      a red spot below the right orbit of the eye,  
20      indicating I don't know what.  It could be anything  
21      from light coming from the patient's right;  
22      embarrassment, as I'm sure the patient has not been  
23      incarcerated every other day or something, so he  
24      could be embarrassed in front of the camera.  His  
25      hair is neatly combed.  There is no evidence of

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1 debris, dirt, blood, bruising. He has a pimple in  
2 his right frontal area.

3 Q. If you want to mark on the screen,

4 Doctor -- this wonderful technology --

5 A. I beg your pardon?

6 Q. If you want to mark the screen, you can use  
7 your finger to circle what you're talking about for  
8 the benefit of Judge Browning.

9 A. Okay. We've got a little area right here.

10 Are you all catching me there?

11 MR. GORENCE: I think it has to be turned  
12 on.

13 A. It's the right forehead is what I'm  
14 pointing on, that pimple. But if you look at the  
15 shadow on the left side --

16 MR. GORENCE: There you go.

17 A. -- you really cannot see anything other  
18 than the arch of the cheekbone, okay? And if you  
19 look at the arch of the cheekbone on the left, the  
20 patient's left, you look at the arch of the cheekbone  
21 on the patient's right, that being the arch of the  
22 cheekbone, they're basically symmetrical.

23 Q. What significance does that have to you  
24 with regard to your opinion that there is no facial  
25 trauma?

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1           A. There is no evidence of facial trauma, is  
2 what I'm trying to say. That's exactly right. The  
3 arch of the nose is perfect. You couldn't do better  
4 rhinoplasty, if you don't mind my saying so.

5           The question right here of the redness  
6 could be anything from the light source coming in  
7 this direction. The patient is very slightly canted  
8 upward, and he is approximately three to five degrees  
9 toward the left, making more light on the right side  
10 than the left side of the face. Basically, you have  
11 a face of an individual at repose, with no evidence  
12 of physical trauma.

13           Q. Do you have any experience -- and we'll get  
14 into exactly when this photograph was taken, and what  
15 time Mr. Tafoya was taken into custody -- but if it's  
16 alleged that this incident took place between 6:08  
17 and 6:15 p.m. on March 11, and these booking  
18 documents indicate approximately 10:30 -- so it's a  
19 little over four hours, maybe four and a half -- do  
20 you have any experience in how a bruise -- or let me  
21 put it this way -- facial trauma manifests itself  
22 over time?

23           A. With the vasculature of the face, which is  
24 so great, you would begin to see swelling, bruising  
25 in the vast majority of cases within 30 minutes; I

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1 mean, within 10 minutes.

2 Q. Now, you're saying because of -- explain  
3 that -- the vascular structure; you're saying because  
4 of the quantity of blood vessels in the face --

5 A. That's exactly right.

6 Q. -- okay, you see evidence -- if there had  
7 been trauma, it would manifest itself sometime within  
8 30 minutes?

9 A. Oh, yes. And to add to that, if you take  
10 the amount of fatty tissue around the orbit, around  
11 the sub-zygomatic area --

12 Q. What is that?

13 A. I'm sorry, below the cheek, below the  
14 cheek. There are fat pads, which will swell very,  
15 very easily. The bones of the face are as fragile as  
16 egg shells, excepting the mandible, which is the  
17 lower jaw, and the skull.

18 Q. Now, you talked about vascular structure  
19 and bruising occurring more easily on the face, is  
20 that true, than other parts of the body?

21 A. Yes.

22 Q. So is that particularly true around the eye  
23 sockets?

24 A. Absolutely true around the eye socket.

25 Q. Why do you say that?

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1           A. Well, the eye socket -- if you look at the  
2 orbit, if you anatomicize -- or if you dissected the  
3 orbit, you see an eyeball, which is what most of us  
4 see. But what you don't see is the fat pad that  
5 surrounds the eye, superior, laterally, medially, and  
6 inferiorly. That's there for a purpose. It's there  
7 to absorb energy; i.e., a blow from external forces.

8           When that happens, the blood vessels within  
9 the periorbital area, and because the thinness of the  
10 face and the superb vascularity of the eyelids,  
11 you're going to get bruising almost immediately.  
12 Anyone who has sustained a black eye or has seen a  
13 black eye occur, would know that.

14           Q. But I want your testimony to be based on  
15 your training and experience as a medical doctor,  
16 with 40 years of practice, and what you've already  
17 outlined. How much was dealing with exactly issues  
18 pertaining to facial trauma?

19           A. We're talking at three to four hours  
20 post-injury. I don't see any injury.

21           Q. And what is your degree of certainty in  
22 expressing that opinion, Doctor?

23           A. Within 95 percent. I see some, what I  
24 would call evidence of emotional trauma. But even  
25 then, I cannot be sure of that because of the

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1 darkness on the other side of the slide.

2 Q. Okay. Well, let me put it this way: It's  
3 not a medical malpractice act -- or case, I should  
4 say -- but do you hold these opinions to a reasonable  
5 degree of medical certainty --

6 A. Yes.

7 Q. -- that you're expressing?

8 Have you ever testified in court? Did you  
9 ever have a forensic practice?

10 A. I can remember going to court maybe five to  
11 ten times over a 27-year period. And that was always  
12 either in the defense of a peer surgeon, or maybe the  
13 defense of a patient. I can't remember, to tell you  
14 the truth. Basically, I would usually give a  
15 deposition.

16 Q. Okay. But you testified as an expert?

17 A. At several, um-hum.

18 Q. And you've approximated that over the  
19 course of --

20 A. Maybe --

21 Q. Let me ask the question --

22 A. -- 50.

23 Q. How many times?

24 A. Maybe 50 to 100 times in 27 and a half  
25 years.

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1 Q. Okay.

2 A. And as a resident.

3 Q. Were you ever not qualified as an expert in  
4 the field of plastic and reconstructive surgery after  
5 being tendered to a court?

6 A. I've never had my credentials questioned.

7 Q. Do you have any other opinions that you'll  
8 be expressing in this case, Doctor? And if so, I  
9 want to ask about your methodology. Other than, as I  
10 understand it, no facial injury, particularly -- and  
11 you've described how likely that would be in the  
12 facial area -- if injury being defined as swelling,  
13 discoloration, lacerations, or abrasion? I think  
14 I've got them all. There is no evidence of that on  
15 this photograph?

16 A. There is none.

17 Q. There is none?

18 A. There is none. Nor of the neck, I might  
19 add. There is no evidence of injury.

20 MR. GORENCE: I pass the witness, Your  
21 Honor.

22 THE COURT: Thank you, Mr. Gorence.

23 Ms. Neda, do you want to cross-examine  
24 Dr. Sanders?

25 MR. GORENCE: Your Honor, could we approach

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1 for one second.

2 THE COURT: You may.

3 (The following proceedings were held at the  
4 bench.)

5 MR. GORENCE: This may come up at trial as  
6 well, but Mr. Rodella has a prostate issue and needs  
7 to use the bathroom, and we might have to take more  
8 frequent breaks. But he's telling me it's a dire  
9 emergency right now.

10 THE COURT: Right now? All right. I was  
11 going to take a break in about five minutes or ten  
12 minutes anyway. So why don't we go ahead and take  
13 our break, and you come back in and you can go ahead  
14 and do your cross-examination.

15 (The following proceedings were held in  
16 open court.)

17 THE COURT: All right. We'll be in recess  
18 for a few minutes.

19 (The Court stood in recess.)

20 THE COURT: All right. Dr. Sanders, I'll  
21 remind you that you're still under oath.

22 THE WITNESS: Sure.

23 THE COURT: Ms. Neda, if you wish to  
24 cross-examine Dr. Sanders, you may do so at this  
25 time.

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1 MS. NEDA: Thank you.

2 THE COURT: Ms. Neda.

3 CROSS-EXAMINATION

4 BY MS. NEDA:

5 Q. Dr. Sanders, I just want to begin by  
6 completing the curriculum vitae information before we  
7 get into your testimony.

8 A. Sure.

9 Q. Thank you, sir. And I understand you've  
10 corrected the licenses and certifications. My  
11 question is have you seen this curriculum vitae  
12 prepared on your behalf by the defense as Exhibit A?

13 A. I believe I have. I can't read it from  
14 there.

15 Q. Okay.

16 MS. NEDA: If I may approach the witness  
17 and give him a copy?

18 THE COURT: You may.

19 Q. Doctor, have you seen that before?

20 A. Yes. There is an error there. It's Rhodes  
21 College in Memphis.

22 Q. Rhodes College in Memphis?

23 A. Yes, or "at Memphis."

24 Q. Okay, sir.

25 A. And the rest of it is basically correct.

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1           Q. Until you get down to the licenses and  
2           certifications?

3           A. Yes, that's right. I am not board  
4           certified.

5           Q. So if I eliminated the last two entries on  
6           the first page of Exhibit A --

7           A. You're fine.

8           Q. Okay. Sir, would you turn the page,  
9           please, of Exhibit A. And there are the professional  
10           memberships and committees to which at one time you  
11           belonged?

12           A. That's correct.

13           Q. Okay. Can you tell us when you belonged to  
14           the American Medical Association, or do you still  
15           belong?

16           A. I'm currently a member.

17           Q. Okay. And Tennessee Medical Association?

18           A. I'm currently a member there.

19           Q. Okay. The reason I'm asking is when you  
20           testified earlier, I thought I heard you say you  
21           were. And so I just wanted to get the time frames of  
22           your membership.

23           A. Well, I'm a retired member of the Tennessee  
24           Medical Association. I guess, for all the American  
25           Medical Association knows, I'm an active member. I

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1 send my dues in. I am retired from the American  
2 Society of Plastic and Reconstructive Surgery. I am  
3 retired from the University of Chicago Surgical  
4 Society. I am still a member of the Alton Ochsner  
5 Alumni Association.

6 Q. What is that, the latter?

7 A. I served my general surgery residency at  
8 the Ochsner Clinic and Foundation in New Orleans.  
9 Dr. Ochsner was a very famous surgeon in the '40s and  
10 '50s. Actually, he was the first surgeon to  
11 recognize the nature of cancer of the lung; in other  
12 words, that it was caused by smoking. And his  
13 specialty at the time was thoracic surgery. I did my  
14 surgical internship and my general surgery residency  
15 at the Ochsner Clinic in New Orleans.

16 Q. Thank you, Doctor. And you have nothing  
17 else to add to this curriculum vitae?

18 A. Not right off.

19 Q. All right. Thank you, sir.

20 Now, you said that you have testified in  
21 the past as an expert in plastic surgery; is that  
22 correct?

23 A. That's correct.

24 Q. And in doing so, sir, did you have occasion  
25 to testify about the aging of facial injuries and

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1 bruising?

2 A. Yes.

3 Q. Okay. And when was that?

4 A. Oh, that was between the years of 1974, all  
5 the way up to probably the year 2000.

6 Q. All right. And you testified, as you are  
7 testifying today?

8 A. Um-hum. Generally, it would be a  
9 deposition, rather than having to come in court. And  
10 generally, most of the cases were regarding physical  
11 trauma.

12 Q. And did you examine the patient or just a  
13 photograph on those occasions?

14 A. Oh, no. These were my patients that I'd  
15 operated on. Most of them, the vast majority, I'll  
16 put it that way.

17 Q. All right. Today you're testifying about  
18 the aging of an injury on the face of a victim only  
19 depicted in a photograph?

20 A. That's exactly right. I did not have the  
21 option of examining the patient, you're correct.

22 Q. Okay. So have you ever testified as an  
23 expert regarding the aging of a facial injury based  
24 solely on a photograph?

25 A. Not that I can recall.

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1           Q.    Were you provided any other pictures of  
2 this victim to make a comparison?

3           A.    No, ma'am, I was not.

4           Q.    All right.

5           A.    I was provided with two things -- if I may,  
6 Your Honor. I was provided with two things. Number  
7 one, the photograph. The only history I got was that  
8 the photograph was taken approximately five to  
9 five-and-a-half hours after incarceration.

10          Q.    Understood. And then you were provided a  
11 badge by Mr. Gorence?

12          A.    I'm sorry?

13          Q.    And then you were provided a badge by Mr.  
14 Gorence?

15          A.    That's correct.

16          Q.    I just want to confirm your testimony. I  
17 asked you the number of times you were called to  
18 analyze -- or testified as an expert, excuse me --  
19 regarding the aging of a superficial injury simply  
20 from a photograph. And the answer is never, except  
21 for this case; is that correct?

22          A.    I can't recall it.

23          Q.    All right. Currently, you're not a  
24 practicing physician because of that traffic accident  
25 in 2004?

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1 A. That is correct.

2 Q. And do you maintain any -- do you  
3 participate in the medical community, either by  
4 teaching or acting as an expert or authoring  
5 articles, or anything?

6 A. I read two journals weekly. One is the New  
7 England Journal of Medicine, and the other one is the  
8 American Medicine Association Journal. Two of our  
9 sons are physicians, one being an orthopedic surgeon  
10 in Chattanooga, Tennessee; the other being an  
11 emergency room physician in south Louisiana. And I  
12 would say we talk probably somewhere between three  
13 and 10 times a week. I kept my current medical  
14 education hours up until 2006. Then, knowing that I  
15 would never go back into plastic surgery --

16 Q. Right.

17 A. -- I let it go. So all I do is a lot of  
18 medical reading. I'll discuss medicine and its  
19 facets all day long, with anyone. But usually it's  
20 with my boys more than anyone else.

21 Q. And the last time you provided expert  
22 testimony, Doctor, was when, do you think?

23 A. I would guess at 1994.

24 Q. And do you recall why you had to give  
25 expert testimony in 1994, sir?

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1           A.     I believe it was a peer associate was being  
2     sued for an error or mistake during surgery; a  
3     technical error, I believe it was.

4           Q.     I see.

5           A.     I defended my associate. The associate won  
6     the case, and that's it.

7           Q.     Good. Have you had to experience the same  
8     discomfort of a medical malpractice suit against  
9     yourself?

10          A.     No.

11          Q.     You're very fortunate.

12          A.     Ma'am, it's very unusual --

13          Q.     I know it is.

14          A.     -- never to have had a suit.

15          Q.     Yes, sir.

16           Now, your method in this particular case,  
17     which caused you to reach the opinion that you see no  
18     physical injuries on the face of this victim, was  
19     your examination of this single photograph; correct?

20          A.     That's correct.

21          Q.     Okay. You compared it to --

22          A.     And the history of being -- having been  
23     incarcerated for five hours.

24          Q.     Yes, sir. I'm sorry I missed that part --  
25     I mean, I didn't miss it; I just failed to mention

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1 it.

2               Okay. And then for purposes of rendering  
3 an opinion about your reasonable expectation of when  
4 an injury should appear, you struck your arm twice,  
5 one on one forearm, and the other on the other  
6 forearm; and you saw nothing after five hours?

7               A. That's correct.

8               Q. Did you see anything after 10 or 30  
9 minutes?

10              A. It was a little bit red for about 10  
11 minutes, and then it went away.

12              Q. Then it went away.

13              And you do notice on the photograph of the  
14 victim -- this one and only -- that there seems to be  
15 pinkness and puffiness on the right cheek, but you  
16 don't know its source; is that right?

17              A. I do not know its source. Now, I see the  
18 redness. Unfortunately, I cannot see any puffiness.  
19 And probably the reason for that is, if you look at  
20 the photo, the light source on the patient's left is  
21 just absent. You cannot even discern the color of  
22 the patient's eyes on the left side.

23              Q. It's sort of shadowy, isn't it?

24              A. The lighting is horrible. That's not why  
25 he had the picture, though. But yes, you see a

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1 redness there. Swelling or puffiness, I do not see.

2 Q. Okay. And so you can't say one way or the  
3 other what caused that?

4 A. No.

5 Q. Now, can you tell us -- your methodology  
6 was the viewing of this picture, and consideration of  
7 the time frame of five to five-and-a-half hours, and  
8 of course your experience. Can you tell us what  
9 publications lay out that methodology or support that  
10 methodology so -- that you rely on to render the  
11 opinion you are?

12 A. Well, any of your basic plastic surgical  
13 textbooks in the division of physical trauma. And  
14 the management of physical trauma can tell you that,  
15 or what you asked. I did not look at any plastic  
16 surgery textbook to interpret the findings I have  
17 right here. I didn't need to.

18 Q. All right.

19 A. There was no evidence of fracture. There  
20 was really no evidence of discoloration. The  
21 symmetry was okay. So I just did not need to refer  
22 to a bibliographical source.

23 Q. Now, are you familiar with the journal,  
24 "Forensic Science and Medical Pathology"?

25 A. No.

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1 Q. And do you know Doctors V.K. Hughes and  
2 Neil E. Langlois?

3 A. No.

4 Q. Are you familiar with "Experimentation in  
5 Order to Determine the Age of Bruises by the Use of  
6 Reflectance Spectrophotometry"?

7 A. I'm sorry. Can you say that again?

8 Q. Yes, sir. Are you familiar with the  
9 research conducted by various scientists to determine  
10 the age of bruises by utilizing reflectance  
11 spectrophotometry?

12 A. Oh, no, I'm not familiar with that at all.

13 Q. Okay. Then you would not be familiar, for  
14 instance, that in December 2010, in the attempt to  
15 age bruising, it was determined that using 147  
16 subjects, and 233 reflectance spectrophotometry  
17 scans, aging of bruising could not be reliably  
18 determined? Would you quibble with that?

19 A. That's foreign --

20 MR. GORENCE: Your Honor --

21 A. -- to me. I was a practicing plastic  
22 surgeon.

23 THE COURT: Hold on, Dr. Sanders.

24 MR. GORENCE: I would ask that if she's  
25 going to ask the question, some of these terms, that

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1       she provide the article, so the Doctor can look at  
2       it. I'm not sure it goes to the Daubert issue.

3       Maybe this is cross-examination. But I think, as a  
4       courtesy, she should give him the article.

5           THE COURT: Well, I'll let Ms. Neda conduct  
6       her cross-examination the way she wants.

7           Overruled. Ms. Neda?

8           MS. NEDA: At this point it's voir dire.

9           Q. And so, you were trying to answer the  
10       question, and I'm sorry you were interrupted. Go  
11       ahead and answer the question.

12          A. I would be glad to evaluate the piece of  
13       literature that you talk about. But  
14       spectrophotometry would have very little to do with  
15       the clinical practice of plastic surgery. One  
16       isolated article, in other words, is what I'm talking  
17       about. If I'm making the point you want. I'm not  
18       sure.

19          Q. I understand what you're saying. But it  
20       has everything to do with examining the optics of the  
21       skin, doesn't it?

22          A. You know, I guess it could. I don't know  
23       much about spectrophotometry, whatever.

24       Spectrophotometry.

25          Q. I have a hard time with that word, too.

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1                   Are you familiar with the "Journal of  
2 Forensic and Legal Medicine"?

3                   A.     No.

4                   Q.     Do you know Doctors M.L. Pilling, P.  
5 Vanezis, V-A-N-E-Z-I-S -- I may not be pronouncing  
6 that correctly -- D. Perrett, P-E-R-R-E-T-T, and A.  
7 Johnston, with a T. Do you know them?

8                   A.     No, I don't know them.

9                   Q.     Do you know that in April 2010, they  
10 conducted an experiment to determine if you could age  
11 bruising by looking at photographs?

12                  A.     I'm not familiar with the article.

13                  Q.     Would you quibble with their conclusion  
14 that bruising is not reliably determined from  
15 photographs?

16                  A.     No, not necessarily.

17                  Q.     Okay.

18                  A.     This patient is a good example. I couldn't  
19 pick up probably 60, 70 percent of any bruising which  
20 would be on the left side of the patient's face, and  
21 this is because of the lighting.

22                  Q.     I understand.

23                  A.     In other words, there are so many variables  
24 there that you're trying to equate. So I would not  
25 agree with that statement.

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1           Q.     Are you familiar with the work published in  
2     the forensic -- well, first off, are you familiar  
3     with the "Forensic Science International" journal?

4           A.     Oh, no, ma'am.

5           Q.     Because forensics isn't your field, right?

6           A.     Forensics is not my field.

7                 Now, if you ask me about the American  
8     Society Plastic Reconstructive Surgery Journal, as of  
9     13 years ago I could have probably quoted you quite a  
10    bit from that. I can quote you some from the Journal  
11    of American Medical Association today. I could quote  
12    you quite a few articles from the New England  
13    Journal, if you want to hear that. But so far, you  
14    haven't hit me with any.

15                 These are very esoteric journals that  
16    you're talking about. And I want to say --

17           Q.     I have to go through them, though, because  
18    they are forensically -- what they're doing is  
19    determining whether or not you can age bruising, and  
20    you're testifying about aging bruising. So I'm kind  
21    of required to do that on my part.

22           A.     I understand.

23           Q.     Okay. So I don't mean to --

24           A.     No, I understand you totally.

25           Q.     Thank you, sir. Thank you.

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1                   Doctor, I do have -- well, actually a  
2 couple more to ask you about.

3                   Now, you indicated you're not familiar with  
4 the "Forensic Science International" journal. But  
5 there is an article called, "The use of photographs  
6 to record variation in bruising response in humans."  
7 Would you disagree that they indicate that  
8 photography is not sufficiently reliable for  
9 determining the age of bruising?

10                  A. If you could repeat the last phrase.

11                  Q. Yes, sir. And I didn't name these doctors.  
12 So let me do that, just in case they do ring a bell.  
13 M.M. Lecomte, T. Holmes, D.P. Kay, J.L. Simons, and  
14 S.K. Vintiner.

15                  I just wanted to indicate the authors of  
16 this particular article. And the conclusion was that  
17 "Photography is not sufficiently reliable for  
18 determining the age of bruise." Do you agree with  
19 that?

20                  A. With the age of bruise, yes, I'd agree with  
21 that, as my last statement implied. If the  
22 photography -- if the lighting is not correct, if the  
23 patient's head is canted or swiveled from the  
24 perpendicular, you can always have shadows, and it  
25 may not be reliable at all --

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1 Q. All right.

2 A. -- as evidenced by this photograph.

3 Q. And so you don't have sufficient evidence  
4 to testify about the aging of the bruise?

5 A. No, what I'm saying is that you don't have  
6 sufficient lighting on the patient's left to  
7 determine whether there is or is not bruising.

8 Q. Right.

9 A. In other words, I would not give you an  
10 opinion on whether the face was bruised on the left  
11 side, because there is no lighting on the patient's  
12 left side.

13 Q. But on the right side there is sufficient  
14 lighting?

15 A. There is sufficient lighting that you could  
16 tell red from red, blue from blue, yep.

17 Q. And you see red; you just don't know its  
18 source?

19 A. That's exactly right. I see -- to go  
20 further, I see redness without swelling -- or you  
21 called it puffiness a while ago.

22 Q. Um-hum. And then, gosh, there is a few  
23 more, but I'm just going to hit one more: "Medicine,  
24 Science and the Law," the journal, are you familiar  
25 with that?

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1           A.    I don't think so.

2           Q.    Okay. The title of the article is, "Can we  
3           assess the age of bruises? An Attempt to Develop an  
4           objective technique" -- an objective technique. The  
5           authors are Sophie Grossman, G-R-O-S-S-M-A-N. A.  
6           Johnston -- looks like he authored that other article  
7           I mentioned -- P. Vanezis, and D. Perrett.

8                   And they, too, conclude -- and I'm asking  
9           you if you agree or disagree -- that "Visual  
10           assessment of bruises is unreliable, and the accuracy  
11           of aging has not been improved by the degree of  
12           forensic experience."

13                   So, in other words -- and this is, by the  
14           way, called "Medicine Science of Law." But it's in  
15           the "Royal Society of Medicine Journal." Are you  
16           familiar with that journal?

17           A.    No, not offhand.

18           Q.    Okay. Would you agree that the visual  
19           assessment of bruises is unreliable?

20           A.    No --

21           Q.    Okay.

22           A.    -- again, for the reasons I've already  
23           stated.

24           Q.    Okay, sir.

25           A.    If I may interject this: As a practicing

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1 plastic surgeon -- or let's say facial traumatic  
2 surgeon, okay -- that's a better word -- the best you  
3 have to rely on is a good photograph. Past that,  
4 there may be other things, but they're not on the  
5 market yet. If you have a good photograph, with good  
6 lighting, you can tell virtually just about anything  
7 you want to say about that individual, with emotions  
8 and physical trauma.

9 Q. And is this a good photograph that you're  
10 basing your opinion on today?

11 A. I'm giving you that opinion. But again,  
12 this photograph lacks the lighting on the patient's  
13 left, which makes me -- I question the redness. I  
14 question -- it could even be heat from the light on  
15 the right, if you follow me. The heat source is  
16 coming from the patient's right. It comes down.  
17 Some lights are hotter than others.

18 Q. Sure.

19 A. I think it's about four feet from the  
20 patient. But it could be two feet. I'm not sure. I  
21 can tell there is no swelling. And I can go into  
22 that, if you want me to.

23 But the nasolabial folds are totally  
24 normal. I can tell that. There is not any swelling  
25 in the lower part of the face, which for this, a hard

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1       lick, you would expect after five hours.

2                   But still and all, the best you have is a  
3                   photograph with good lighting.

4                   MS. NEDA: Thank you so much, sir.

5                   That's all I have. Thank you, Judge.

6                   THE COURT: Thank you, Ms. Neda.

7                   Mr. Gorence, you have no redirect of  
8                   Dr. Sanders?

9                   REDIRECT EXAMINATION

10                  BY MR. GORENCE:

11                  Q. Doctor, I want to make sure that the Court  
12                  understands your opinion. And I believe the  
13                  articles -- because I've looked at some from Ms.  
14                  Neda -- is where you have a bruise identified in a  
15                  photograph or a patient, and then you attempt to go  
16                  backwards and date or time how long -- you know, when  
17                  was the bruising occurring, you're not offering an  
18                  opinion to that nature at all?

19                  A. No, that's correct.

20                  Q. Because, if I understand, you're saying  
21                  there is no bruise to begin with, so we're not  
22                  attempting to do what Ms. Neda's literature -- and  
23                  I'm going to pull them all --

24                  A. That's correct.

25                  Q. -- but you're not trying to date a bruise,

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1 or say when it occurred, because your opinion, there  
2 is no bruise, as you can see it on this photograph?

3 A. That's correct.

4 Q. Given that, with your opinion, would it  
5 make any difference -- the literature Ms. Neda is  
6 questioning you -- and we'll look at it before trial,  
7 depending upon how the Court rules -- but you're not  
8 trying to date a -- or time how long somebody had a  
9 bruise, or when it occurred, because you don't see  
10 one in the first instance; do I have that correct?

11 A. That's correct.

12 MR. GORENCE: I have nothing further, Your  
13 Honor.

14 THE COURT: Thank you, Mr. Gorence. All  
15 right. Anything else you want to present?

16 Dr. Sanders, you may step down. Thank you  
17 for your testimony.

18 THE WITNESS: Thank you.

19 THE COURT: Is there anything else you want  
20 to present on Dr. Sanders' testimony?

21 MR. GORENCE: No, Your Honor.

22 THE COURT: Anything else you want to  
23 present evidentiary-wise, Ms. Neda, on Dr. Sanders'  
24 testimony?

25 MS. NEDA: No, sir.

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1                   THE COURT: All right. You want to argue  
2 it, Mr. Gorence?

3                   MR. GORENCE: Your Honor, I'm not going to,  
4 unless the Court has questions. We've got a factual  
5 record. The Court, I know, is very familiar with  
6 Daubert; it's had these issues all the time. In  
7 essence, as I said, when the Supreme Court on that  
8 opinion, the same with Kumho Tire really talks about  
9 junk science. This is someone who has the experience  
10 and background in dealing with exactly this type of  
11 issue, using photographs as exact -- it's not a  
12 perfect photograph -- some of that goes to the  
13 weight.

14                   The issues in this case, and the Court will  
15 hear, is that Mr. Tafoya complained of an injury to  
16 the side of his face that's illuminated. And that  
17 will all come out at trial. And in this case, the  
18 central issue is -- well, one of them will be -- and  
19 the jury will have to find: Was there a physical  
20 injury. This testimony will assist the jury in  
21 making that determination. It also -- and I don't  
22 know if they're going to offer it, and maybe they lay  
23 a foundation -- but the Court can see paragraph 63 of  
24 the affidavit by Agent Howard, he opines that there  
25 is a physical injury. And I can read it. I don't

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1 know if that could come in. He's on the witness  
2 list, and I don't know what his testimony is going to  
3 be.

4 THE COURT: How did he determine that there  
5 was a facial injury? Did he observe Mr. Tafoya at  
6 some point, or did he get that from somebody else?

7 MR. GORENCE: He, according to paragraph  
8 63 -- and I'll read it, Your Honor. This was to  
9 Judge Molzen. He says, "I reviewed Tafoya's booking  
10 photograph, which shows a reddish swollen area under  
11 his right eye. This is consistent with Tafoya's  
12 statement that Sheriff Rodella hit him in the face  
13 with his badge, and then ground the badge in his  
14 right eye and against the cheek." That's what the  
15 agent opined as part of the probable cause for the  
16 warrant. So as I said, it's one of the central  
17 issues the jury will have to find: Is there injury?  
18 This is -- and Mr. Tafoya did not make his complaint  
19 to the State Police. It wasn't gone back, so this is  
20 really the only evidence we have is this booking  
21 photograph. But it is important, and the doctor did  
22 opine, not -- and I think it was his last  
23 testimony -- is that there is no bruise to begin  
24 with.

25 And the literature -- and I'll pull it,

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1 because I did look at it -- there is a body of  
2 literature. We are trying to go back, saying you  
3 have this trauma, when did it occur? It's the  
4 same -- and I can remember, as a prosecutor, when  
5 they find a body, and you try to date the time of  
6 death, it's the same concept, only different  
7 manifestation of trauma. That's not what his opinion  
8 is.

9 THE COURT: He talked about this experiment  
10 he did with his arms. Do you want to bring that out?  
11 Is that something you want to bring out in your  
12 examination of him?

13 MR. GORENCE: I will, Your Honor, in  
14 terms --

15 THE COURT: How does that help you?

16 MR. GORENCE: Well, I want to do everything  
17 that he did in terms of: Here's the badge. And he  
18 said it's a different thing, because you can see --  
19 the doctor was not provided with all Mr. Tafoya's  
20 statements. And all he did -- as I said, is Agent  
21 Howard said, part of Tafoya's statement was that he  
22 was, quote, hit in the face with his badge, and then  
23 ground the badge in his right eye and against the  
24 cheek. So I will be asking questions, when we have a  
25 copy -- we'll have the actual badge. It's got points

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1 on it. And he didn't do that as part of his  
2 experiment. But I'm saying, if Mr. Tafoya said it  
3 wasn't just slammed against his cheek, but you're now  
4 taking a badge that has the potential for laceration,  
5 I'll be asking those questions.

6 I should point out, Your Honor, that -- and  
7 this will come up with the next witness -- the FBI  
8 did seek to interview our traffic reconstruction  
9 expert, Mr. O'Brien. He started answering, and said  
10 "I'd like to have Mr. Gorence present," and then  
11 Agent Howard -- and I'll get the e-mail that I sent  
12 to Ms. Neda -- I said, "I have no problem with the  
13 Government conducting a pretrial interview. I don't  
14 have a problem if it's recorded, as long as I'm  
15 there." I gave them full access to both of these  
16 experts, provided of course, that I could have the  
17 same pretrial opportunity to talk to Mr. Overby,  
18 their tendered expert. That e-mail went off, I  
19 think, on Monday or Tuesday. It would have been  
20 after our expert designation. And the Government --  
21 I never got a response. So they didn't offer -- they  
22 didn't want to take me up on that opportunity to  
23 actually sit down and have an in-depth interview with  
24 either of these experts.

25 Your Honor, I'm not going to repeat the

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1 law. It's all stated in the brief. I think that  
2 this is an issue that is directly -- in fact, the  
3 jury instructions -- it is the Government's burden to  
4 prove beyond a reasonable doubt that Mr. Tafoya  
5 suffered a physical injury. And we have a photograph  
6 and a doctor with the background and qualifications  
7 to address that.

8 THE COURT: All right. Thank you, Mr.  
9 Gorence.

10 Ms. Neda, do you want to argue your motion  
11 or your objection?

12 MS. NEDA: This is an exhibit the United  
13 States intends to offer at trial. One is the  
14 driver's license photograph of the defendant, of the  
15 victim. And you'll see the victim, of course, at  
16 trial. And the other is the booking photograph to  
17 which Dr. Sanders proposes to testify. If we could  
18 eliminate those. Thank you. I think that it's one  
19 photograph. It's a grainy photograph. It does show  
20 pink on the right. In my assessment it shows  
21 puffiness as well. And that's for the jury to  
22 decide. Because Dr. Sanders, although appears to be  
23 an experienced surgeon from years gone by, has never  
24 testified like this before. He's asking -- he's been  
25 asked to really stretch. He cannot testify to any

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1 methodology other than looking at the photograph.

2 His test sample is two arms, same subject.

3 There is just no basis for this testimony. He's  
4 looking at a photograph. That's what the jury can  
5 do. I've argued in my objection that Dr. Sanders'  
6 proposed testimony simply usurps the ability of the  
7 jury to make its own assessment on this photograph.  
8 And that's our objection.

9 THE COURT: All right. Anything else, Mr.  
10 Gorence?

11 MR. GORENCE: No, Your Honor. I can see  
12 that actually -- that photograph looks enhanced. We  
13 received one. I don't know if they'll lay a  
14 foundation for that. And I can see it now it  
15 actually has more light than the other one. So I  
16 don't know how the Government got that, or if that  
17 was enhanced in some way. But I'm going to show that  
18 to the doctor as well. And he can -- this is a  
19 question, is: Does he have a basis to give an  
20 opinion that would assist the jury?

21 Ultimately, obviously, it's the jury's  
22 call. But the question is should they do that  
23 without any methodology? And you heard the doctor  
24 talk about the issues in terms of looking at the face  
25 from one side, comparing to the other. There is a

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1 whole procedure to identify trauma. And he went over  
2 in great detail what that would be. That is  
3 something that is not within the normal experience of  
4 a juror comparing from baseline to midline, bisecting  
5 a photograph, comparing one side to see if it's  
6 swollen, vis-a-vis the other.

7 But anyway, that was part of his  
8 methodology. It's far more than what Ms. Neda is  
9 talking about in terms of just seeing what this badge  
10 does when hit forcefully against the forearm. That  
11 was really -- and we'll get in more detail to see if  
12 the badge alone, with that type of strike, would  
13 create some sort of a laceration.

14 Obviously, I'll ask different questions at  
15 trial in terms of Mr. Tafoya's statement. If you  
16 took this badge and now rubbed it, as Mr. Tafoya has  
17 alleged, on -- near an eye socket, and in the eye --  
18 and there will be other opinions based on that.

19 But, Your Honor, I don't have anything to  
20 add, other than what I've said.

21 THE COURT: Well, I don't think I'm going  
22 to allow Dr. Sanders to testify about what he sees on  
23 the photograph. So I think that's for the jury. The  
24 photograph is not a great one. He admitted that.  
25 Y'all each are seeing things that I'm having a little

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1 trouble seeing or not seeing. And I think that's for  
2 the jury to determine. I'm not sure that having a  
3 doctor come in and testify about what he sees in the  
4 picture necessarily helps the jury. So I'm not going  
5 to allow Dr. Sanders to testify about what he sees in  
6 the picture. I'm not sure his expertise is any  
7 greater, or less, about seeing bruises or lacerations  
8 on the face.

9 I am inclined to allow him to testify about  
10 the length of time that object hitting into an eye  
11 socket would take to bruise. It seems to me that is  
12 something that a medical doctor with his expertise  
13 would have some knowledge of, whether it be 30  
14 minutes, or an hour, five hours.

15 I will ask you, Ms. Neda, to give me the  
16 articles, four or five articles that you referred to.  
17 If I determine, after reading those articles, that  
18 there is no sound basis for it, then I may exclude  
19 that testimony. But at the present time, it seems to  
20 me that -- his CV was rather short in supporting his  
21 ability to testify here. But I thought there was  
22 sufficient testimony today for him to be qualified to  
23 testify that if this injury occurred, bruising would  
24 show up in 30 minutes. That seems to be different  
25 than what -- the literature you're referring to,

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1 which is trying to say: There is a bruise, when did  
2 the injury occur? But I want to read your literature  
3 and make sure that I'm not characterizing it in a way  
4 that I shouldn't, since I haven't read the  
5 literature. But that's my thoughts on what  
6 Dr. Sanders should be able to testify to.

7 All right. Do we want to go to the  
8 Government's expert? It's nationally -- I guess,  
9 Dr. Manuel Overby; do you want to go to him? Since  
10 you're the proponent, do you want to put him on or  
11 anything, Mr. Pena?

12 MR. PENA: Sure, Your Honor.

13 THE COURT: Is he here today?

14 MR. PENA: No, he's not, Your Honor. I did  
15 not interpret the defense motion to strike the  
16 testimony of Manuel Overby as a motion that was based  
17 on Daubert. That wasn't a citation that they had.  
18 It did not appear to be on his qualifications, nor on  
19 methodology, nor helpfulness to the jury, but rather  
20 the argument that the defense made in Doc 50.  
21 Defendant's motion to strike expert testimony was  
22 entirely based on the use of SOPs and training at  
23 trial. And, of course, that is an issue that comes  
24 up in varying ways throughout the course of this  
25 litigation.

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1                   And the way that Mr. Overby's expert  
2                   opinion was developed -- if Your Honor also has in  
3                   reference Document 34-2, which is the opinions that  
4                   Mr. Overby provided in this case, those refer  
5                   exclusively to nationally accepted police practices.

6                   There is a distinction between expert  
7                   testimony regarding why police do what they do as a  
8                   national best practices, or accepted practices basis,  
9                   versus testimony regarding standard operating  
10                  procedures.

11                  And so in the United States' response, we  
12                  make efforts to distinguish the case law that, of  
13                  course, the defense has cited in the motion to  
14                  strike. All of the cases -- and, of course, Your  
15                  Honor is the author of many of these varying opinions  
16                  interpreting Tanberg versus Sholtis. But I think  
17                  that the issue has never --

18                  THE COURT: Have I ever dealt with  
19                  nationally -- the way he puts it, "nationally  
20                  accepted procedures in the field of law enforcement"?  
21                  Have I ever dealt with that issue?

22                  MR. PENA: Yes, Your Honor. And, in  
23                  candor, that is in Vondrak.

24                  THE COURT: That's pretty early.

25                  MR. PENA: It's a 2009 case, I believe,

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1 Your Honor. And I don't think that it was squarely  
2 before the Court. The distinction that the United  
3 States is drawing, and the basis --

4 THE COURT: What did I do in Vondrak?

5 MR. PENA: You did not find a distinction  
6 between nationally accepted practices and standard  
7 operating procedures. But, you know, I, of course,  
8 have not reviewed the submissions that the parties  
9 made in that particular case. The decision did not  
10 reference Zuchel, which is, of course, controlling  
11 Tenth Circuit law, which --

12 THE COURT: You got that case which  
13 affirmed the district court allowing in the  
14 nationally accepted law enforcement procedures, and  
15 then you have Marquez, which affirmed the district  
16 court excluding nationally accepted procedures. It  
17 seems to me that the Tenth Circuit is leaving this  
18 area to the discretion of the trial court more than  
19 the SOP area. Would that be a fair sort of  
20 conclusion?

21 MR. PENA: I think that is fair, sir.

22 THE COURT: All right. Give me the  
23 rationale you think -- it would seem to me that --  
24 well, let me ask you, and let you talk: What do you  
25 think -- why do you think that I should allow

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1 nationally accepted procedures in, given the sort of  
2 recent hostility by the Tenth Circuit to allowing  
3 SOPs?

4 MR. PENA: Well, I think that, of course,  
5 the rationales that appear in Tanberg versus Sholtis  
6 are so important. And I think the fidelity to the  
7 principles that brought the Tenth Circuit to its  
8 decision there actually lead to a distinction between  
9 nationally accepted practices and standard operating  
10 procedures.

11 The reason is that in Tanberg versus  
12 Sholtis, the Tenth Circuit's concerns were primarily  
13 two-fold. First, a lack of uniformity. The concern  
14 was that, if either plaintiffs, or I suppose, in this  
15 case prosecutors, were to claim that standard  
16 operating procedure violations could constitute a  
17 constitutional violation in themselves, then, of  
18 course, the Constitution would effectively be varying  
19 from jurisdiction to jurisdiction, depending on the  
20 police agency that had enacted its procedures.

21 Now, that uniformity concern does not apply  
22 when we have expert testimony regarding nationally  
23 accepted police practices. That is a national  
24 standard. It is uniform throughout the United  
25 States. And so it is -- the uniformity concern just

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1 does not exist when the testimony is on that basis.

2 THE COURT: Where does -- where did these  
3 nationally accepted procedures come from? I mean, is  
4 there some book out there that Mr. Overby is going to  
5 point to? Are they just his opinion? Where do these  
6 procedures, these nationally accepted procedures come  
7 from?

8 MR. PENA: Your Honor, I believe that they  
9 come from a consensus of police trainers throughout  
10 the country. I don't believe that there is a  
11 particular source book. But I do believe that it is  
12 the tradition, the practice -- the standard  
13 traditions and practices that are common to police  
14 departments all across the country.

15 THE COURT: And what are you going to argue  
16 to the jury? What are you going to turn to the  
17 jury -- after Overby testifies, what are you going to  
18 tell them about his testimony when he testifies that  
19 common practice for off-duty police officers is to  
20 report the license plate number and description to  
21 the local dispatch? Are you going to tell them about  
22 that? How do you link that up with the elements that  
23 you have to prove in this case?

24 MR. PENA: In this case, Your Honor, the  
25 ultimate element is whether the defendant's conduct

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1 was reasonable under the Fourth Amendment. And that  
2 is the jury issue that the jury will decide. And it  
3 is certainly relevant to the reasonableness that,  
4 basically, no officer would do this. Nationally,  
5 officers are all trained. Nationally, the accepted  
6 practice is, if you are off duty, if you are in a  
7 private vehicle, you see a traffic violation, every  
8 officer that you speak to will say, "I'm going to  
9 write the plate down. I'm going to call dispatch.  
10 And I'm going to let it go."

11 THE COURT: But couldn't you make that same  
12 argument with SOPs?

13 MR. PENA: Couldn't --

14 THE COURT: That would be the identical  
15 argument you would make to the jury if I let you  
16 bring in SOPs.

17 MR. PENA: Well, it's very, very similar,  
18 certainly. But the SOPs, of course, are a local  
19 standard. And the testimony would be that  
20 nationwide -- New Mexico is not an outlier in this  
21 particular practice. Rio Arriba is not an outlier in  
22 this particular practice. The national standard  
23 would be that an officer --

24 THE COURT: But just because -- let's say  
25 Rio Arriba had a practice for off-duty police

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1 officers to do something different than just report  
2 it to the dispatch. Would that in any way tell us  
3 what the constitutional standard is in this case?

4 MR. PENA: I think the standard operating  
5 procedures really only inform us as to the  
6 defendant's state of mind. And so we don't hold  
7 those out as applying to the constitutionality.

8 THE COURT: What evidence do we have -- and  
9 since we don't know whether Mr. Rodella is going to  
10 testify, what evidence are we going to have that Mr.  
11 Rodella is familiar in any way with nationally  
12 accepted procedures?

13 MR. PENA: Well, we will, I'm sure, hear a  
14 certain amount of his professional background. He  
15 was a State Police Officer prior to becoming Sheriff,  
16 prior to his experience as a magistrate judge. He  
17 was a magistrate judge for a certain number of years  
18 as well. And we will hear testimony from at least  
19 two of his instructors during his law enforcement  
20 recertification.

21 THE COURT: What does Overby really give  
22 you that the training stuff I gave you yesterday  
23 doesn't give you in much greater quantity? I mean,  
24 it's very specific as to his training, what he knew.  
25 And it seems to me that's much more relevant to the

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1 scienter than some expert coming in and talking about  
2 nationally accepted standards about pulling over a  
3 vehicle and approaching a vehicle.

4 Here's my concern -- well, let me ask a  
5 question, then I'll give you another question about  
6 my concern.

7 MR. PENA: Sure, Your Honor. Yes, I do  
8 think that the SOPs and the particular training  
9 witnesses, those bear on the defendant's scienter.

10 Overby's testimony is to help the jury  
11 understand what police practices are reasonable, and  
12 help the jury understand when a reasonable officer is  
13 confronted with particular circumstances, what  
14 factors are they considering, and what risks should  
15 they be considering, and what is accepted police  
16 practice as far as the objective actions that the  
17 defendant took.

18 So I suppose, if you wanted to draw that  
19 distinction, SOPs and training are relevant to the  
20 defendant's subjective understanding. And Overby's  
21 testimony will help the jury assess his objective  
22 behavior.

23 THE COURT: My concern, the way the expert  
24 report is laid out is that you first have Overby  
25 assume Mr. Tafoya's version of events, and then he

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1 comments on that. And then Mr. Overby then assumes  
2 Mr. Rodella's version of events, and then Overb  
3 comments on that. It strikes me as kind of one of  
4 these wind-up witnesses at the end of a trial, where  
5 we use the expert to summarize our case. I'm  
6 wondering if that's really an appropriate use of an  
7 expert.

8 MR. PENA: Well, that's certainly not the  
9 intent. And yes, Your Honor, we have laid it out in  
10 that way. Of course, in order to render opinions,  
11 then, he's got to have some sort of springboard.

12 And so, if Your Honor -- if the rule is  
13 that the United States shouldn't say: Assuming the  
14 truth of such-and-such a witness' testimony, but  
15 rather should say: Assuming the hypothetical that  
16 this happened, and that way ask our questions so they  
17 are not recitations of previous testimony, but are  
18 elicitations of hypothetical opinions, which is the  
19 core of expert testimony, of course, we'd be happy to  
20 comply with the Court's order on that.

21 THE COURT: All right. Anything else, Mr.  
22 Pena?

23 MR. PENA: No, sir.

24 THE COURT: All right. Let me hear from  
25 Mr. Gorence, and I may have more questions of you.

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1 Mr. Gorence.

2 MR. GORENCE: Yes.

3 THE COURT: Mr. Gorence, you've got an  
4 expert in the wings. They've got their expert. The  
5 Tenth Circuit has affirmed letting these in, keeping  
6 them out. Why not let it in, and both sides inform  
7 the jury if they're going to make a determination  
8 about what is reasonable under the Constitution, have  
9 as much information as they can.

10 MR. GORENCE: To answer that, let me go  
11 back to what I think was your first question of Mr.  
12 Pena. You will see -- this is in Document 34 of  
13 their notice, Your Honor, you've seen this report of  
14 Mr. Overby. The first part he says "nationally  
15 accepted police practices," but he doesn't delineate  
16 where that comes from. He doesn't say who has  
17 adopted it. He doesn't say that's part of the  
18 materials that he's reviewed. He hasn't given a cite  
19 to where they exist. He doesn't say they've been  
20 adopted by either -- any jurisdiction.

21                   THE COURT: Let's say -- and I don't --  
22 let's say Mr. Overby comes in and says, I've trained  
23 officers in all 50 states, and I'm familiar with the  
24 training given of all police officers in all 50  
25 states; I've trained FBI agents, DEA agents. Then we

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1 have someone that's gone all across the country.  
2 What do you think then? He's not referring to a book  
3 or any sort of pamphlet. He's just referring to his  
4 experience of going all around the country and  
5 meeting and training police officers.

6 MR. GORENCE: Well, that would be an  
7 opinion without any basis of foundation. His own --  
8 what should happen. He's articulating this to,  
9 quote, "a nationally accepted police practice."

10 THE COURT: But how do you get nationally  
11 accepted police practices? How would you have them?

12 MR. GORENCE: Well, I'm assuming it would  
13 be much like in the Bar, when there are model rules;  
14 there are committees that are promulgated.

15 THE COURT: We know that. They don't exist  
16 here. I mean, so I hate to put up a phantom issue,  
17 and require him to do something that we know doesn't  
18 exist. The question is: From his experience, is  
19 that enough to come in and say these are nationally  
20 accepted procedures?

21 MR. GORENCE: Off this report -- we don't  
22 even know what that is, Your Honor -- and I don't  
23 think if they wanted to bring in --

24 THE COURT: He's telling us what they are.

25 MR. GORENCE: No. He hasn't given a cite

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1 to where they come from.

2 THE COURT: No, but there is no cite to  
3 give.

4 MR. GORENCE: But he just said this is  
5 nationally accepted. And, Your Honor, in our  
6 challenge, part of this is that we have no idea what  
7 he's talking about. He hasn't even said -- if it's  
8 just his opinion what's nationally accepted police  
9 practices --

10 THE COURT: I think we have to assume that,  
11 because there is not a book you can go to that says  
12 "nationally accepted police procedures."

13 MR. GORENCE: Well, I --

14 THE COURT: I think it is his opinion as to  
15 what is nationally accepted. Am I correct, Mr. Pena?

16 MR. PENA: Yes, sir.

17 THE COURT: Okay.

18 MR. GORENCE: So it's just his opinion of  
19 what's nationally accepted. And they'll lay a  
20 foundation that these are, in my opinion, what 50  
21 states -- and I know he had been a Game and Fish  
22 Officer in New Mexico. He's never been a federal law  
23 enforcement officer.

24 Your Honor, the question is, is that there  
25 has to be a foundational basis for the opinion.

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1 That's a methodology question. His methodology  
2 doesn't say how he came up with his opinion to say  
3 what is nationally accepted. It's nowhere in here.  
4 And he doesn't -- in the materials that he's  
5 reviewed -- doesn't say there is a body anywhere  
6 comparing jurisdictions around the country, model  
7 rules. And I do believe they exist. FBI model  
8 training, use of force. There are use of force  
9 continuums that come up all the time in the --

10 THE COURT: But you'd be objecting if they  
11 tried to bring those in, saying those are close to an  
12 SOP.

13 MR. GORENCE: Well, I understand. But they  
14 are articulated in police manuals to say you have  
15 continuum models. There is a basis.

16 Here, we have nothing whatsoever.

17 Next -- and I do want to touch on this in  
18 terms of how ultimately this opinion would unfold --  
19 because you raised an interesting point, whether or  
20 not Mr. Rodella testifies. If you let this in, I  
21 think -- I'm going to be telling you right now, I  
22 want the transcripts of all of his underlying  
23 material to come in as exhibits.

24 On one hand, Ms. Neda says, We don't want  
25 recorded interviews of Mr. Crespin, Officer Sanchez,

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1 tape-recorded. All of these have to come in --  
2 particularly the Sheriff's statements -- in their  
3 entirety. So that -- because then he has this  
4 hypothetical, assuming one to be true, assuming the  
5 other.

6 Next, he cannot opine on statements which  
7 are purely hearsay, not under oath, from -- I've  
8 never seen an opinion like this from Mr. Tafoya. If  
9 he wants to watch sworn testimony, and base opinions  
10 off of that, that's a different foundation. But  
11 this -- to be candid, I've never seen an expert  
12 report in a criminal case like this. Because I'm  
13 certainly entitled to bring in every one as exhibits  
14 so I can cross-examine him on what he reviewed,  
15 including what Ms. Neda would say would be the  
16 hearsay statements. Because they're not hearsay  
17 then, because he's relying on them. I'm going to go  
18 through and mark everything that he's reviewed in  
19 their entirety so that I can go through all of it.

20 Next: Anything with Mr. Tafoya is  
21 clearly -- he said I'm assuming the truth -- they're  
22 all hearsay. It's not his in-court statements under  
23 oath, which he'd have to watch to render an opinion.

24 Finally -- and we've laid this out, Your  
25 Honor, and I just want to make the record again -- we

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1 have now not found a single case in the United States  
2 of America in a 242 action that allows this.

3 I understand -- and I want to articulate  
4 this, because this goes to the SOPs and practices in  
5 the 1983 action where -- the rule is, and it couldn't  
6 be, whether it's Tanberg, or Marquez or all of  
7 them -- I think it's even quoting two of your  
8 opinions -- whether it was Solis Maruffo or the  
9 Montoya case that Ms. Oliveros and Tim Padilla tried  
10 with you -- "evidence of SOPs is irrelevant to  
11 whether a defendant acted objectively reasonable."  
12 They're irrelevant.

13 Now, this question on state of mind, where  
14 the definition of willfulness -- the willfulness is a  
15 specific intent crime. A specific intent to violate  
16 the law. That's the problem here. Because in the  
17 civil context, the Court has allowed that testimony.  
18 In Montoya, it was for impeachment, when the officer  
19 said, We did everything appropriately, and they could  
20 be impeached then, based on that testimony with their  
21 training, limiting instruction.

22 Here, the problem that the Court is  
23 venturing into is that this testimony invades the  
24 very idea which you're going to be giving a limiting  
25 instruction on, because you're going to say: You did

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1 this willfully. And willfully, means that you had an  
2 intent to violate the law; the law being the  
3 Constitution. That's the problem with this bootstrap  
4 in the criminal case.

5 Civilly, you can see it's coming in on  
6 training may be relevant, particularly when there  
7 is -- and I can see -- it was I think Solis  
8 Maruffo -- it comes in on claims -- civil claims  
9 having to do with adequate supervision and training  
10 as a cause of action.

11 Here, there is only one issue. And Mr.  
12 Pena -- really, the jury instruction is not whether  
13 Mr. Rodella acted reasonably. It's whether "Mr.  
14 Rodella deprived Mr. Tafoya of his right to be free  
15 from excessive force and unlawful arrest, as defined  
16 by the Constitution of the United States." It goes  
17 on -- and you can see -- very specific in our  
18 proposed Instruction No. 3 what that requires.

19 And the specific -- this willful idea, Your  
20 Honor, it's willful in terms of a specific intent to  
21 violate the law. And inevitably, what will happen,  
22 if the Court were to admit SOPs, other things under  
23 this idea of willfulness -- even training -- you're  
24 saying it's relevant to show he violated the  
25 constitution. The very -- the antithesis of what

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1       Judge McConnell writes -- it's irrelevant for any  
2       purpose -- and you've written -- in terms of whether  
3       or not to view a violation of an SOP training manual,  
4       or anything, is irrelevant to the question of whether  
5       or not someone acted objectively reasonable; i.e.,  
6       the Constitution was violated.

7               If that is the case, Your Honor --

8               THE COURT:   But it seems the Tenth Circuit  
9       has backed off a little bit on the training issues.  
10       And I have, too.   But -- so I guess that's then the  
11       question:   What do we do -- is the Tenth Circuit  
12       creating a little pocket for SOPs?   And I can think  
13       of some arguments why the local versus national, that  
14       you would want to keep those out.   And there was also  
15       the additional justification that you want to  
16       encourage local police districts to have SOPs and not  
17       then punish them in court.   Whereas, national  
18       standards don't have that problem.

19               What's, then, the problem with letting  
20       training materials in now, but not nationally  
21       accredited?   Why draw that distinction?

22               MR. GORENCE:   Well, again, Your Honor, even  
23       if there was a violation, it's irrelevant to the  
24       question as to whether or not the violation of a SOP  
25       or a national standard.   That does not mean the

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1 Constitution was violated. That's the holding of  
2 Tanberg and every other case. In your cases, it is  
3 irrelevant in that determination.

4 The slight opening on training, only in a  
5 civil case, is usually based -- and I can see it from  
6 your Montoya opinion -- when an officer, in a 1983  
7 action says, Everything I did was appropriate, well,  
8 then you can impeach that testimony with training;  
9 maybe even an SOP, if that's the testimony that the  
10 defendant in their case opens up, again, with a  
11 limiting instruction. But it requires that.

12 Secondly, in a criminal case -- and again,  
13 why this hasn't come up, and the Government hasn't  
14 cited one, so their research must be the same as  
15 mine -- it has never come up in the United States of  
16 America that this has occurred, at least in a  
17 published opinion in a 242 case. We haven't found  
18 one. We started with the Tenth Circuit, of course --  
19 and I actually went circuit by circuit on our  
20 stuff -- and we just haven't found it. The  
21 Government hasn't cited one.

22 The point being is you can see the problem  
23 here is that if you admit it under their theory of  
24 willfulness, it's willful to violate the  
25 Constitution. So you're going to show a violation of

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1 that, but actually back door. The very thing that  
2 Judge McConnell says is the evil. Even if you do  
3 one, does not mean you violated the Constitution.

4 And that's our argument, Your Honor.

5 In terms of the testimony, as I said, this  
6 report is so flawed, it doesn't delineate what is a  
7 nationally accepted practice; doesn't say where that  
8 comes from, remotely.

9 Two, I will be -- if he is allowed to  
10 testify, then clearly everything but Mr. Montoya's  
11 (sic) statements have to be admitted so that I can  
12 completely cross-examine -- the jury can see what he  
13 reviewed. And I want Ms. Neda -- because I want to  
14 make that argument -- as well as the statements of  
15 Mr. Rodella, Sr., in their entirety. It says  
16 transcript of a recorded statement that he had. And  
17 they all come in. Because, otherwise, the Government  
18 is going to say, Well, these are -- you know, they  
19 can't come in because they're not offered by a party  
20 opponent. They have to, if this gentlemen is going  
21 to testify pursuant to his opinion. And as I said,  
22 he'd have to watch the sworn testimony of Mr. Tafoya.  
23 Otherwise, it's rank hearsay; may not correspond  
24 remotely with what his sworn testimony would be.  
25 That's why this report is really utterly flawed.

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1 THE COURT: All right. Thank you, Mr.  
2 Gorence.

11 You almost have to bring out hearsay  
12 statements as the proponent for his conclusions to  
13 make sense. For example, he states -- let me see if  
14 I can find one -- "Following the initial encounter,  
15 Sheriff Rodella continued to pursue MT." How do you  
16 get that in without there being -- without him being  
17 a conduit for some hearsay statement?

18 MR. PENA: Well, for one thing, Your  
19 Honor -- and of course, I'd be referring to Federal  
20 Rule of Evidence 703, bases of an expert opinion.  
21 And that rule tells us that "an expert may base an  
22 opinion on facts or data in the case that the expert  
23 has been made aware of, or personally observed. If  
24 experts in a particular field would reasonably rely  
25 on those kinds of facts or data in forming an opinion

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1 on the subject, they need not be admissible for the  
2 opinion to be admitted."

3 THE COURT: I don't have any problem with  
4 what he's relying on. But how is he going to testify  
5 to his opinion without going ahead and testifying as  
6 to the hearsay itself?

7 MR. PENA: There are two answers to that.  
8 First, that he could be present in court, as has been  
9 discussed, and hearing the live testimony from the  
10 opinions -- well, I'm sorry, from the witnesses  
11 throughout the course of trial. And second, if for  
12 some reason that's not logistically feasible, then he  
13 can be asked hypothetical questions, and it can be  
14 explicitly left to the jury whether the hypothetical  
15 even applies to the case. And that is what expert  
16 testimony is all about.

17 THE COURT: Well, you're familiar with the  
18 rule -- I'm looking for it now -- help me out, if you  
19 can find it -- it says, "If the facts or data would  
20 otherwise be inadmissible, the proponent of the  
21 opinion may disclose them to the jury only if their  
22 probative value in helping the jury evaluate the  
23 opinion substantially outweighs their prejudicial  
24 effect," which I probably wouldn't find in this case,  
25 that somebody may offer this is essential to the

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1       jury's determination. So you're not going to be able  
2       to bring out those facts through him.

3            Basically, you can put him on the stand and  
4       say -- you know, you can say what he's reviewed. But  
5       in the end, isn't he just going to be able to turn to  
6       the jury and say, I think he's violated nationally  
7       accepted procedures in his stop, and whether you look  
8       at his version or MT's version? That's about all you  
9       can do. You can't walk him through and have him  
10       testify about where he got any of this information,  
11       and then tell the jury that -- for example, Rodella's  
12       act of jumping through the car window with this  
13       firearm. How is he going to testify about that  
14       without that being -- you offering hearsay testimony?

15            MR. PENA: I could ask a hypothetical, sir.

16            Now, I do want to clarify, we do not intend  
17       to use Mr. Overby as a vehicle for admission of  
18       otherwise inadmissible hearsay whatsoever. That is  
19       simply not anything to do with what Mr. Overby --

20            THE COURT: How is this different than --  
21       let's say we had a video of the incident, we had a  
22       video. And he sat there on the stand, and while the  
23       jury watched the video, and I watched it, and  
24       everybody watched the video, he commented on it as he  
25       walked through and said, That violates nationally

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1 accepted procedures; that violates nationally  
2 accepted procedures? Would you think that's a good  
3 idea for an expert to watch with the jury a video,  
4 and sort of give a running commentary, like at a  
5 football game, whether that's acceptable or not?  
6 Would you want an expert to do that?

7 MR. PENA: I think that I'd want an expert  
8 to be aware of additional surrounding circumstances.  
9 But assuming that the expert is apprised of all the  
10 known circumstances in that video, yes, I think  
11 that -- I mean -- and of course, that is the expert  
12 testimony in the Rodney King trial, is the expert  
13 walked the jurors, almost frame by frame, through  
14 that particular incident. So, yes, I do think that  
15 that would be acceptable testimony.

16 And I would also like to address something  
17 on that point. We have cited several cases that have  
18 indicated that it is a nationwide practice to admit  
19 the type of testimony about nationwide standards in  
20 law enforcement.

21 In addition to *Zuchel*, which is the Tenth  
22 Circuit case, we've also cited *Champion versus  
Outlook National*, which is a Sixth Circuit case from  
24 2004. And we've cited *Samples versus City of  
Atlanta*, which is an Eleventh Circuit case from 1990.

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1 There is another --

2 THE COURT: Do you know what those two  
3 circuits do with SOPs? Because I know -- my  
4 impression is the Tenth Circuit has been more  
5 restrictive with SOPs than other circuits. Would you  
6 agree?

7 MR. PENA: I would agree with that, sir. I  
8 don't know how these other circuits treat SOPs,  
9 because I do think that we've all had the same  
10 experience of not finding a lot of national case law  
11 regarding SOPs. The Tenth Circuit has certainly made  
12 it a point. But the background assumption seems to  
13 be that nationally accepted police practices are  
14 legitimate expert testimony.

15 THE COURT: There is a lot of stuff in his  
16 report. Do you really want him to testify to all  
17 this stuff?

18 MR. PENA: He may not offer all of those  
19 opinions, no, sir.

20 THE COURT: Because it makes it difficult  
21 for the Court to figure out what you really want to  
22 do with him here, because some of this stuff, it just  
23 seems to me -- like, for example, he says, "It's  
24 equally unacceptable for a police officer to make  
25 threatening statements, such as 'It's too late,' when

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1 a suspect begs for his or her life." Do we really  
2 need Mr. Overby to come in and say that?

3 MR. PENA: Well, no. But certainly if  
4 there is testimony --

5 THE COURT: What does he mean by "equally  
6 unacceptable." Unacceptable to who?

7 MR. PENA: I agree that that particular  
8 statement might be a little too vague. But he would  
9 clarify exactly what he's referring to as a national  
10 standard. And --

11 THE COURT: But is it really a national  
12 standard on whether a police officer should make a  
13 threatening statement such as, "It's too late," when  
14 a suspect begs for his or her life? I mean, is that  
15 really a national standard out there?

16 MR. PENA: I think we'd need to hear from  
17 him whether there is --

18 THE COURT: Well, but I have to decide  
19 today in my gate-keeping function whether we should  
20 hear from him at all. So are you wanting him to say  
21 that?

22 MR. PENA: I don't need him to say that  
23 particular thing. But as far as, is there a national  
24 protocol for what types of communications you have  
25 with people as you're trying to effect an arrest,

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1       absolutely. I think I would want him to testify  
2       about a national protocol for the types of  
3       communication that are appropriate.

4                   So I agree that -- it's poorly phrased in  
5       the particular disclosure. But I do think that it  
6       would be, when properly phrased, the proper subject  
7       of expert testimony.

8                   THE COURT: But I can keep going. "Sheriff  
9       Rodella violated nationally accepted law enforcement  
10       procedures when he said, 'Do you want to see my  
11       badge, motherfucker? Here's my badge.'" Do I -- is  
12       there really a national standard on that?

13                  MR. PENA: I'm sure that the national  
14       standard doesn't -- isn't so specific as to words.  
15       But yes, I do think that there would be a national  
16       standard about the types of communication, the ways  
17       in which an officer should communicate with a  
18       suspect. And for sure, at some point particular  
19       words are a judgment call, and he would be offering  
20       his opinions.

21                  THE COURT: All right. Anything else, Mr.  
22       Pena?

23                  MR. PENA: I would just like to sum up by  
24       reemphasizing that Mr. Overby would be offering  
25       opinions regarding the reasonableness of the conduct.

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1 And the ultimate touchstone in this case is the  
2 Fourth Amendment, unreasonable seizure. Although we  
3 have a lot of additional elaborations that the courts  
4 have provided to us about what we mean by  
5 reasonability over the course of years, the ultimate  
6 constitutional standard is, is the seizure  
7 unreasonable. He will be there to offer comments,  
8 opinions on that.

9 THE COURT: All right. Thank you, Mr.  
10 Pena.

11 Well, I am troubled by Zuchel, and the  
12 Tenth Circuit affirming the allowance in, in 1983.  
13 But I also have the Marquez case in which they've  
14 excluded this testimony. Also, while I can think of  
15 some distinctions between SOPs and nationally  
16 accepted standards, I'm not sure that those  
17 distinctions are very persuasive, given what  
18 McConnell and the Tenth Circuit has recently held  
19 about SOPs, and how strongly they have disfavored  
20 those in 1983 cases.

21 I'm sympathetic to the Government's  
22 requirement here. It has a heightened burden in this  
23 criminal case of proving scienter. But much of  
24 Overby's testimony seems to me to be not very helpful  
25 to the jury. Statements such as, "Police officers

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1 should anticipate that when he or she is dressed in  
2 plainclothes and driving unmarked private vehicles,  
3 members of the public might have difficulty  
4 identifying him or her as an officer." I'm not sure  
5 that we need an expert to testify about some of those  
6 issues. And he has a number of those in here.

7 I am concerned about the Government's  
8 ability to get his conclusions in without being  
9 accompanied by hearsay statements. I'm also  
10 concerned about where these nationally accepted  
11 procedures come from.

12 I think there are certain statements that  
13 he makes in his opinion that probably can come in.  
14 But I'm not sure that they necessarily can come in  
15 only through him. And they may be better coming from  
16 others. For example, he states that "Off duty  
17 officers have no requirement to act when faced with  
18 petty misdemeanor or misdemeanor traffic violations  
19 that occur in their presence." I think that's  
20 probably something the jury needs to be told, but --  
21 if in fact, that's the law -- but I'm not sure that  
22 he in any way tells me with his report where he  
23 reaches that conclusion and how he does it; whether  
24 there is something in New Mexico law, or otherwise.

25 Another statement, "Sheriff Rodella made no

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1 mention of searching MT after he was subdued." Well,  
2 I think that's a fact that needs to be pointed out,  
3 if that's, in fact, the truth, or that's the  
4 Government's contention. But do we need an expert to  
5 be testifying about those facts? So much of what he  
6 is doing here is he's testifying as to facts. I  
7 think those will come in otherwise. Some of it is  
8 not the subject, I think, of really expert opinion.  
9 Some of it I have doubts as to whether there is  
10 really a nationally accepted practice on the  
11 particular facts that he's getting at.

12 And so I have concerns about the -- him  
13 doing little more than just commenting upon the  
14 reasonableness or unreasonableness, in his opinion,  
15 as to the different versions of the case.

16 I think that I'm going to have to choose  
17 between whether I follow Zuchel, and find no abuse of  
18 discretion in admitting these, or Marquez and the SOP  
19 cases, which found no abuse of discretion in denying  
20 these. And I'm inclined to think that these more  
21 recent cases and the difficulty of distinguishing  
22 SOPs from nationally accepted practice, while I  
23 understand the arguments why there could be, in some  
24 ways you could think of SOPs and being a stronger  
25 case for putting the sheriff on notice of what is

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1 required of him.

2 And that's the reason I'm inclined to allow  
3 the limited training and the material yesterday,  
4 which is informed by the SOPs, but not allow  
5 Mr. Overby to come in and testify about violations of  
6 nationally accepted practice.

7 If there is still something he can say,  
8 such as defining terms in his field, I'm not  
9 excluding him entirely. But as far as educating the  
10 jury regarding nationally accepted law enforcement  
11 procedures and practice, I'm inclined to keep that  
12 out. And then presenting opinions, applying those  
13 procedures and practices to the facts of this case,  
14 I'm inclined to keep that out as well.

15 All right. Let's go to the accident  
16 reconstructionist. Did you have another expert?

17 MS. NEDA: Well, it wasn't challenged.  
18 It's a DNA analyst.

19 THE COURT: So that wasn't challenged. So  
20 it's just -- we just got the expert then on the  
21 reconstruction? I'm sorry, Ms. Neda.

22 MS. NEDA: I was going to say that with  
23 respect to this next witness, in the interests of  
24 efficiency, the United States is not asking for a  
25 lengthy voir dire, because we do not contest his

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1 qualifications.

2 THE COURT: All right. Let me ask this,  
3 maybe I can -- here's the problems I'm having with  
4 the accident reconstructionist, or the issues I'm  
5 having with him. It seems to me that he can testify  
6 about the acceleration of a Jeep, the acceleration of  
7 a Mazda, and make comparisons between those two. But  
8 is he really in a position to do anything more than  
9 that? He seems to me that he can provide that basic  
10 information to the jury about the differential in  
11 accelerations between the two vehicles. But I guess  
12 I get concerned when he tries to do any more than  
13 that. So those are my issues of concern, if that  
14 helps cut down on what you want to bring out.

15 MR. GORENCE: Your Honor -- and I see, that  
16 would be on page 4 of his report. So he could talk  
17 about the Mazda acceleration, the Jeep's  
18 acceleration. There will be testimony in terms --  
19 the Government has listed a Google map. We have a  
20 three-mile period of time at speeds in which --  
21 because the Government calls this a chase, and we  
22 dispute that. We think it's flight, trying to get  
23 away, in a much faster car.

24 I would not -- and again, this opinion, if  
25 you look at page 4 of Document 42-3 on his report,

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1 Your Honor, I would not be eliciting -- I know he put  
2 this in a report, and we had to move pretty quickly  
3 to get experts -- I can't say it's consistent with  
4 information that Mr. Rodella, Jr. gave about the  
5 manner in which Mr. Tafoya was operating the vehicle  
6 unless he sat in. I have the same concerns. He  
7 can't base that on a hearsay statement. He'd have to  
8 listen to Mr. Rodella, Jr.'s testimony about what  
9 transpired.

10 And then, the important part, Your Honor,  
11 is the photographs that will be admitted in this  
12 case. You've seen the one of the car when it's  
13 high-ended on a pole. And then there is photographs  
14 of that Mazda, which roughly what happened -- you can  
15 see the circular marks. And that's what I want -- I  
16 want to have him describe photographs, and in terms  
17 of how could this happen. And it's very important.  
18 If you are trying to continue your flight in a way  
19 with a vehicle -- and he can explain this -- with  
20 front-wheel drive, the tire marks -- we'll need  
21 assistance of a traffic reconstructionist to show  
22 that, as he's in reverse, it is spinning around. And  
23 you can even see the tire mark of when he's  
24 high-centered. There is a huge divot.

25 THE COURT: If you want to go ahead and put

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1 him on, go ahead.

2 MR. GORENCE: That's what I want to do.

3 THE COURT: I was just telling you my  
4 concerns. I felt like the capabilities of the Jeep  
5 and the Mazda were fair game. But it's the  
6 photograph area that I need help on.

7 MR. GORENCE: I didn't mean to leave, Your  
8 Honor. I'm going to go get him.

9 THE COURT: Mr. O'Brien, if you'll come up  
10 and stand next to the witness box, before you're  
11 seated, Ms. Wild, my courtroom deputy, will swear you  
12 in.

13 DENNIS O'BRIEN,

14 after having been first duly sworn under oath,  
15 was questioned and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. GORENCE:

18 THE CLERK: Please be seated. State your  
19 name for the record, please.

20 THE WITNESS: Dennis O'Brien.

21 THE COURT: Mr. O'Brien, Mr. Gorence.

22 Let's talk a second about scheduling. We've gone --  
23 I need to probably give Ms. Bean a break. Maybe what  
24 we could do is take a break, then we could go and  
25 finish this witness, and argument on this, and then

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1 break for lunch. What do you think?

2 MR. GORENCE: Whatever the Court's  
3 preference.

4 THE COURT: I need to give Ms. Bean a  
5 break. We've been going about an hour and a half.  
6 Then we'll come back and I'll let you put on  
7 Mr. O'Brien.

8 (The Court stood in recess.)

9 THE COURT: Mr. O'Brien, I'll remind you  
10 you're still under oath.

11 THE WITNESS: Yes, sir.

12 THE COURT: Mr. Gorence, if you wish to  
13 conduct your direct examination.

14 MR. GORENCE: Thank you, Your Honor.

15 THE COURT: Mr. Gorence.

16 DENNIS O'BRIEN,

17 after having been first duly sworn under oath,  
18 was questioned and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. GORENCE:

21 Q. Mr. O'Brien, I want to go through a very  
22 brief background. You've submitted a CV to the  
23 Court; is that accurate?

24 A. Yes, sir.

25 Q. How long have you been in the field of

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1 traffic reconstruction?

2 A. Since 1996.

3 Q. Have you been accepted as an expert and  
4 testified as an expert in the courts of New Mexico?

5 A. Yes, sir.

6 Q. In fact, have you actually been retained by  
7 the U.S. Attorney's Office as an expert on their  
8 behalf?

9 A. Yes, sir.

10 Q. Would you tell the Court about that?

11 A. I testified as an expert in U.S. versus  
12 Linda Diaz, a federal vehicular homicide case from  
13 Pojoaque Pueblo.

14 Q. And in that case, that's a criminal case,  
15 you were actually retained by the U.S. Attorney's  
16 Office?

17 A. Yes, sir.

18 Q. Who was that case prosecuted by?

19 A. Mr. Jack Burkhead.

20 Q. Did you actually testify in court?

21 A. Yes, I did.

22 Q. Who was the judge?

23 A. I do not recall.

24 Q. In this case, did you author a report, a  
25 four-page report?

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1 A. Yes, I did.

2 Q. Do you have any changes to that report in  
3 terms of any typographical errors, anything of that  
4 nature?

5 A. Yes, I do.

6 Q. What are those? Let's start with that.

7 A. On the cover page, I incorrectly listed the  
8 date of the incident and the time.

9 Q. Those typos -- so you've marked down as  
10 March 11, at approximately what time?

11 A. Can I refer to my report?

12 Q. Yes.

13 A. I indicated in my report that the date of  
14 incident was March 26, 2014 at approximately 4:00  
15 p.m., when in actuality, it occurred on March 11,  
16 2014, at approximately 5:15 p.m.

17 Q. I want to get to your opinions.

18 MR. GORENCE: And Your Honor, in a matter  
19 of brevity, if the Court is not concerned, as I heard  
20 earlier, I'm not going to go into the methodology of  
21 opinions expressed by the vehicle capabilities  
22 between the Mazda 3 and the Jeep owned by Mr.  
23 Rodella, unless the Court wants to hear --

24 THE COURT: Let me just ask, are you doing  
25 this, Ms. Neda?

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1 MS. NEDA: Yes.

2 THE COURT: What do you think about that?

3 Do you have any problem with that aspect of his  
4 report, just the capabilities of Jeep versus Mazda?

5 MS. NEDA: I have no problem with the basis  
6 for the witness' statement as to the acceleration  
7 capability of these two vehicles. I don't see the  
8 relevance without more, and therefore, my objection  
9 is not based on the methodology of learning how each  
10 of these engines function, but on this particular day  
11 how those engines were put in force and applied, the  
12 acceleration rate was applied.

13 THE COURT: That's probably about the same  
14 line I have.

15 MR. GORENCE: That's a legal argument. I  
16 understand --

17 THE COURT: The relevancy is, yes, I agree.  
18 I agree that that's a legal argument.

19 MR. GORENCE: And I'll address that later  
20 then.

21 Q. In addition to the capabilities, were you  
22 able to determine if the Mazda is a front-wheel drive  
23 vehicle?

24 A. Yes, it is a front-wheel drive vehicle.

25 Q. Does that have significance for you in

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1 terms of analyzing the photographs in this case?

2 A. Yes, sir.

3 Q. I want to talk about the photographs. Did  
4 you receive copies of the photographs that were taken  
5 on the day of the incident, Mr. O'Brien?

6 A. Yes, sir.

7 MR. GORENCE: I want to start -- and these  
8 are marked, Your Honor, in my exhibit package that  
9 was tendered to the Court as B. I haven't  
10 individually marked them. I guess I should do that.  
11 This would be B-1, B-2.

12 Q. Let me first -- have you seen this  
13 photograph, Mr. O'Brien?

14 A. Yes, I have.

15 Q. Then I've marked that as B-2. This is B-3.  
16 Have you seen that photograph?

17 A. Yes, sir.

18 Q. Do you have the photographs that you looked  
19 at with you?

20 A. Yes, sir.

21 Q. Would you take them out?

22 A. Yes, sir.

23 Q. I'm going to use your photographs because I  
24 want to make sure that these are the ones -- I think  
25 you've reviewed them all.

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1                   MR. GORENCE: But I will mark these for  
2 this hearing, Your Honor, as I think we're on  
3 exhibit -- I think it was D -- and I'll mark all of  
4 these as D. Let me ask you, on these photographs of  
5 where the vehicles ended up, I want to put this up,  
6 and I'll mark this -- do you mind if I write on this  
7 as D-1. I'm changing from my trial exhibits to his  
8 exhibits for this hearing with the Court's  
9 indulgence.

10                  Q. Now, on D-1, what does this depict?

11                  A. It shows a view of the Mazda 3 up against  
12 the pipe. You can't see the pipe in this image, but  
13 the other images tie that in together. It shows the  
14 Mazda would be facing in the easterly direction.

15                  Q. Okay. Is there anything significant -- and  
16 I say this is the final resting point for the Mazda,  
17 is it not?

18                  A. Yes, it is, up against the pipe.

19                  Q. And when you see the left front tire, is  
20 there anything significant about that as it relates  
21 to your opinions?

22                  A. It does. I do see that the tire is turned  
23 to the right, but there appears to also be a furrow  
24 generated in the dirt, which extends from the bottom  
25 left of the photograph towards the tire at its final

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1 rest position.

2 Q. Now, you can actually mark that. Would you  
3 mark what you mean by a furrow. A furrow meaning the  
4 tire has dug into the dirt? Is that what you mean by  
5 that?

6 A. Yes, sir.

7 Q. Using your finger, okay. And what's the  
8 significance of that with a front-wheel drive  
9 vehicle? Where you now have a furrow, what does that  
10 mean to you as a traffic reconstructionist?

11 A. Well, tying -- using this photograph, along  
12 with other photographs that you have present with  
13 you, it's consistent with my opinion that the vehicle  
14 spun around violently in a clockwise direction, as  
15 the vehicle spun in an aggressive manner in that  
16 dirt.

17 Q. Well, I don't want to talk about  
18 aggressive. The fact that it's actually digging,  
19 it's being embedded at this point indicates that it's  
20 not spinning and just sinking down there as  
21 acceleration is being applied to the front-wheel  
22 drive?

23 A. What this shows me is the end of the path  
24 of the vehicle as the tires are sliding sideways, so  
25 that sideward motion of the tires are creating that

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1 divot, that furrow in the dirt.

2 Q. Now, you say a furrow in the dirt -- and  
3 correct me, maybe I should have you analyze -- you  
4 can touch your screen and take that off.

5 In fact, let me start with the overview  
6 first. What does that picture depict?

7 A. This picture depicts the front tires of the  
8 Mazda as the vehicle was spinning backwards 180  
9 degrees, generating the marks that are generated here  
10 in the dirt, which are acceleration marks, as the  
11 front end is swinging around.

12 Q. And what's the significance -- so you're  
13 saying prior to being -- let me ask this: Prior to  
14 being embedded on the pipe, it's actually spinning,  
15 you indicated, in a counter-clockwise way?

16 A. Yes, sir, rotated in a clockwise direction  
17 as it was moving backwards; then the front end swung  
18 around.

19 Q. Tell me the methodology that you utilized  
20 to come up with that opinion that it's actually  
21 spinning, digging these tracks -- not a road, but a  
22 dirt -- a dirt surface.

23 A. Well, the marks begin wide out in this  
24 area. And they gradually arc down, and they become  
25 narrow where they eventually will come over the top

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1 of each other in this fashion. Down at the bottom of  
2 the screen is where the tires would side swipe coming  
3 to that position facing eastbound.

4 These marks -- what these show also is that  
5 there is some side slipping involved with the pattern  
6 that the dirt is kicked outwards in this direction,  
7 some oblique marks, which indicate the tires are  
8 spinning, they're rotating while they're side  
9 slipping as the tires are moving sideways, with the  
10 tires rotating.

11 Q. Is that further depicted in this  
12 photograph?

13 A. Yes, sir, you can see the oblique  
14 striations right in this area.

15 Q. And what would cause that?

16 A. The tires rotating while they're side  
17 slipping. So the vehicle is under acceleration.

18 Q. Okay. As they're rotating -- you're saying  
19 the driver of the vehicle is applying gas, trying --  
20 and not gaining traction, so what's happening?

21 A. Correct. The tires are side slipping as  
22 they're under hard acceleration.

23 Q. Okay. And that's what I want to get to,  
24 the hard acceleration. How can you say that by  
25 virtue of looking at these photographs?

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1           A.    Because these tire marks are clearly  
2   evident of the vehicle rotating, as taught in the  
3   field of traffic crash reconstruction. They are  
4   consistent with, more similar in appearance to yaw  
5   marks, which are generated by a side slipping tire as  
6   the vehicle is moving out in its path, its  
7   trajectory, with the tire tracking outside -- the  
8   rear tire tracking outside the front tire.

9                   In this case, it's obvious to me from my  
10   training, experience, and knowledge of crash  
11   reconstruction, that that is from a laterally  
12   slipping and accelerating rotating tire.

13           Q.    And you used the word "hard acceleration."  
14   Why would that be? And what's the methodology that  
15   you used to get to not just that it's accelerating  
16   but a hard acceleration to cause marks like this?

17           A.    Well, the tire marks -- the tires have to  
18   be breaking the traction threshold for standard  
19   travel. If the tires were turned and the vehicle is  
20   backing up, you wouldn't leave this kind of marks,  
21   you'd have tire tread. But the tires are spinning,  
22   in that they're breaking contact with the dirt,  
23   displacing the dirt. And they are also sideways,  
24   they're lateral, which means that it would take a  
25   hard acceleration and rotational force to cause the

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1 vehicle to swing around and generate those marks.

2 Q. And what caused the rotational force? So  
3 you've got acceleration, hard; and a rotational  
4 source. What caused that?

5 A. The rotational force is brought about from  
6 the driver turning the wheel and accelerating hard as  
7 the vehicle is moving backwards.

8 Q. This photograph, does that further amplify  
9 your opinion?

10 A. This goes along with my opinion. It  
11 appears that the sun is washing out some of the  
12 marks, the oblique marks. But the deep furrows are  
13 visible right in here.

14 Q. Now, in your report you used the words that  
15 these photographs -- is there any other ones that you  
16 want to highlight? If so, I'll show them to you in  
17 the packet. If there is anything else you want to  
18 really use? I've shown some, but I don't want to go  
19 through every one of them. If there is, I'll put it  
20 up so you can describe that for Judge Browning.

21 A. This photograph provides a good overall  
22 view of the tire marks as they come together near the  
23 bottom left of the image.

24 Q. I thought we had --

25 A. It wasn't marked, as the other ones are.

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1           Q. Again, if you want to correct me if I'm  
2 wrong, I thought you did, but tell me what's  
3 significant on this photograph.

4           A. These also show the path of the tires as  
5 they travel through the furrows in this direction.  
6 And they come together and appear to unify down on  
7 the bottom.

8           Q. Now, in your opinion, as articulated on  
9 page 4, Mr. O'Brien, you said, "These are consistent  
10 with an aggressive maneuver, where the driver  
11 accelerated backwards and cut the tires to the right,  
12 followed by braking, to swing the front end of the  
13 Mazda around roughly 180 degrees from west to east."

14           The first part I want to talk -- the  
15 opinion about aggressive maneuver. Before I get to  
16 that, what was your methodology to show that this  
17 driver accelerated backwards, cut the tires to the  
18 right, followed by braking, to swing the front end of  
19 the Mazda around roughly to a 180 degree angle from  
20 west to east?

21           A. As indicated in my report, I did interview  
22 T.J. Rodella out at the scene. And in speaking with  
23 him in his description of what the vehicle did, I  
24 took that into account as to how these tire marks  
25 could have been generated. I do see from these

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1 photographs that the dirt out there is soft, it's  
2 very sandy. As can be seen in these images, that  
3 there is boot tread over the top of these tire marks  
4 that indicate they're fresh, as a result of the  
5 culmination of this incident.

6 So looking at all the photographs here,  
7 taking into account what T.J. Rodella described the  
8 movement of the vehicle did upon his observation, and  
9 also the police report, and the fact that the vehicle  
10 was facing the opposite direction and then backed up  
11 into the pipe, these tire marks are totally  
12 consistent with the vehicle initiating that maneuver  
13 as indicated by deputy -- by T.J. Rodella.

14 Q. Now, if the Judge were to find that you  
15 possess testimony that would assist the jury in this  
16 case, meeting the standard under Daubert, you  
17 understand that you would be listening to the  
18 testimony of Mr. Tommy Rodella, Jr., as he testified  
19 under oath. And I would want to ask you a question,  
20 assuming -- and I'm saying, if you're allowed, you  
21 will be watching and listening to that testimony to  
22 form your opinions. Do you understand that?

23 A. Yes, sir.

24 Q. Okay. If he testified consistent under  
25 oath, as well as the cross-examination, with what he

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1 told you at the scene, would your opinions in any  
2 way -- they wouldn't change, would they?

3 A. No, sir.

4 Q. The photograph pertaining to when the  
5 vehicle ultimately got high-ended in the rear on the  
6 pipe, this photograph -- and there was a close-up of  
7 this photograph -- we started marking those D-2 and  
8 D-3, do you have an opinion as to the amount of force  
9 it would take for the vehicle to become lodged on  
10 that pipe?

11 A. No, sir. I wouldn't be able to provide  
12 that.

13 Q. Finally, then, you say that this was an  
14 aggressive maneuver based on your training and  
15 experience. Why do you say that?

16 A. Because it would take a lot of acceleration  
17 and force to cause the vehicle to initiate a 180  
18 degree rotation while moving backwards.

19 Q. And when you characterize it as aggressive,  
20 that's -- what do you mean by that? That's because  
21 of the amount of force, meaning how fast the vehicle  
22 had to be accelerated to do that?

23 A. Correct. The amount of rotational  
24 acceleration through the power train, through the  
25 front tires, aggressive spinning of the tires as the

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1       vehicle is moving backwards and spinning around. The  
2       force had to be strong enough to cause that vehicle  
3       to do a 180 degree rotation in the dirt.

4                    MR. GORENCE: I have no further questions.

5                    THE COURT: Thank you, Mr. Gorence.

6                    Ms. Neda, do you have cross-examination of  
7        Mr. O'Brien?

8                    MS. NEDA: Your Honor, if we could go to  
9        Chief Kassetas, I will cross him later. And the  
10       reason is, as you know, Chief Kassetas, Captain  
11       Thornton, and Lieutenant Skinner have all been  
12       subpoenaed. But they were subpoenaed last night, and  
13       but they still agreed to come.

14                  Now, Chief Kassetas has an appointment at  
15        1:00. They're picking a new Chief Medical Examiner.  
16        So if he could be on the witness stand now -- quite  
17       frankly, as the Court knows, actually with all the  
18       experience the Court has, to be subpoenaed the night  
19       before ordinarily doesn't even require compliance.  
20       This is not really giving them reasonable notice.  
21       And he is the Chief of NMSP. So I'm going to ask  
22       that Chief of Police Kassetas be able to testify  
23       right now.

24                  And the other thing, Your Honor, is that  
25       the purpose of his testimony would be -- should be

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1 relevance -- and the Court knows under the Rules of  
2 Evidence that relevance does apply -- is that whether  
3 or not the United States, either the FBI or the U.S.  
4 Attorney's Office, had any influence on the changing  
5 of these New Mexico State Police reports. I know the  
6 answer is going to be no. I know it's going to be no  
7 for Mr. Kassetas, Mr. Skinner, and Thornton. And if  
8 that question is asked first, everything after that  
9 is not relevant, and we could save a lot of time.  
10 Because what's at issue here is whether the federal  
11 government, according to Mr. Gorence's own belief,  
12 whether the federal government tried to get the NMSP  
13 to change recommended charges or the narrative in  
14 their reports against Mr. Rodella.

15 THE COURT: Do you have any objection to  
16 taking the Chief right now?

17 MR. GORENCE: No, Your Honor.

18 THE COURT: All right. So let's go ahead  
19 and bring him in. And you're calling him; correct,  
20 Mr. Gorence?

21 MR. GORENCE: That's correct, Your Honor.

22 THE COURT: If you want to get him.

23 Mr. O'Brien, if you'll step down. Thank you, and  
24 we'll resume you in a moment here.

25 All right. Now that we're switching back

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1 to motion to disqualify, everybody wanted to invoke  
2 the rule, or does anybody care. Ms. Neda?

3 MS. NEDA: I'm sorry, Your Honor?

4 THE COURT: Do y'all want to invoke the  
5 rule at this point?

6 MS. NEDA: No, Your Honor. Again, as I was  
7 indicating -- this is Mr. Pena's response to Mr.  
8 Gorence's motion -- but as I was indicating, the  
9 machinations and the procedures of NMSP are not at  
10 issue, as long as the United States didn't have  
11 anything to do with it. So if that question could be  
12 asked up front, Chief Kassetas could be free.

13 THE COURT: Well, I'll let Mr. Gorence  
14 conduct his examination. But I don't hear anybody  
15 wanting to invoke the rule.

16 MS. NEDA: No, sir.

17 THE COURT: Chief, if you'll raise your  
18 right hand. Before you're seated, Miss Wild, my  
19 Courtroom Deputy, will swear you in.

20

21

22

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1 PETE KASSETAS,  
2 after having been first duly sworn under oath,  
3 was questioned and testified as follows:

4 DIRECT EXAMINATION

5 THE CLERK: Please be seated and state your  
6 name for the record, please.

7 THE WITNESS: Pete Kassetas.

8 THE COURT: Mr. Kassetas, Mr. Gorence.

9 MR. GORENCE: Thank you, Your Honor.

10 BY MR. GORENCE:

11 Q. Mr. Kassetas, you are the Chief of New  
12 Mexico State Police?

13 A. Yes, I am.

14 Q. You received a subpoena yesterday,  
15 including one duces tecum, indicating whether or not  
16 you had any records pertaining to a report or reports  
17 that were filed by the New Mexico State Police  
18 pertaining to Michael Tafoya; you received that, did  
19 you not?

20 A. Yes, I did.

21 Q. Tell me what you did to search to see  
22 whether or not you had any responsive documents?

23 A. I looked through my e-mails to see if I had  
24 anything saved, and asked one of my Majors that I  
25 knew I had communicated with, to see if he had had

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1 any e-mails with attached reports.

2 Q. Do you have anything?

3 A. I do.

4 Q. Can I see that?

5 A. Sure. This is a copy of a report, with  
6 corrections made by me.

7 Q. Let me see everything you brought pursuant  
8 to the subpoena. Chief, I'll just mark this as  
9 Exhibit E. Because I have some questions on  
10 everything here that is paginated, and I don't want  
11 to write on it. Let me ask you if I can make a copy.  
12 So I see -- I'll put this up, the first page -- it  
13 appears to be something with a time line?

14 A. Yes.

15 Q. Who prepared this?

16 A. I did.

17 Q. When did you prepare it?

18 A. This morning.

19 Q. You red-lined out something that says  
20 "Approved by OS, by Sergeant Olson." What's that?

21 A. I believe I made an entry or indicated that  
22 the report was approved by Officer Sanchez by  
23 Sergeant Olson, but it wasn't on that date. And we  
24 can look at the report to actually see the date.

25 Q. Okay. When you say "Incident occurs," what

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1 do you mean by that?

2 A. It looks like that's the day it was  
3 reported to us.

4 Q. To the State Police?

5 A. Yes, sir.

6 Q. The underlying incident, you know, was  
7 earlier than that?

8 A. I'm not sure. I was looking at the report.

9 Q. The next thing you've handed me appears to  
10 be a document of seven pages. It's not signed by  
11 anyone at the back. It has dates, and it has  
12 handwriting on it. This indicates that this  
13 report -- first of all, what report is this?

14 A. This is the same report. And this is the  
15 version that either the lieutenant or captain -- I  
16 don't know -- or someone in the chain of command  
17 corrected. So I have the -- it's a little bit out of  
18 progression. The copy with the red markings is mine,  
19 and that was the catalyst for starting the  
20 corrections on the report.

21 Q. You're saying red marks. Is there a  
22 different report?

23 A. There is. There is a second one. If you  
24 keep looking, there is the same report with red pen  
25 marks about three pages in. No, that's the wrong

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1 one. There is another packet, sir. No.

2 Q. Not this one?

3 A. No. That's the original final version.

4 There is another draft. That was the one that I  
5 discovered in reading the incident report.

6 Q. This report?

7 A. Yes.

8 Q. Okay. Again, this indicates that the  
9 offense was a simple assault. And you're indicating  
10 that you received this and made changes yourself?

11 A. If you look at that -- as you're showing me  
12 the first page of the narrative -- I had made  
13 corrections after reading the report, grammatical, in  
14 spelling, in sentence structure, to the point where I  
15 had just kicked it back to the supervisors to fix,  
16 because --

17 Q. When did you do this?

18 A. If you give me my time line back -- but I  
19 believe after the 5th or 6th of June.

20 Q. After the search warrant was served by the  
21 FBI?

22 A. Yes, I'd seen it on the news. And I knew  
23 we had done an investigative report. And I'd asked  
24 to review that report. And when I did, I immediately  
25 noticed there were several problems with the report

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1 that the officer did.

2 Q. So this was -- and I see from your time  
3 line -- it would have been after June 4th. So when  
4 did you go back, and as you said --

5 A. June 5th I had the report sent to me in a  
6 PDF. My Public Information Officer sent it to me. I  
7 asked if he could find a copy of the report. And  
8 after reading it, I had -- there is a series of  
9 e-mails there, where you'll follow my train of  
10 thought. I had sent it back to the district to say,  
11 "This needs to be fixed," as any supervisor would  
12 probably do.

13 Q. Had this already been submitted and signed  
14 by Mr. Sanchez and -- Officer Sanchez -- and his  
15 Sergeant Olson?

16 A. No. If you turn to the back page where  
17 it's called the "status."

18 Q. The back page of this report?

19 A. Yes, sir. Keep turning to right there.  
20 Let's take a look up at the end there. Right there  
21 where that circle is, where it says Kenneth Olson,  
22 Sergeant. Normally, when you have an approved  
23 report, there will be a date associated with that  
24 box. So what that tells -- when I look at it is  
25 Orlando Sanchez, the patrolman, dated it as a

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1 completed report, but the Sergeant hadn't signed off  
2 on it yet. And if it occurred in March -- the report  
3 was entered two months later -- it very well should  
4 have been approved.

5 Q. Now, in this copy with your corrections --  
6 and you can see -- we can go through it in terms of  
7 what was changed to -- marked on the 5th, you didn't  
8 change anything with regard to how this was going to  
9 be described as a simple assault?

10 A. No, I didn't indicate anything there. I  
11 looked more at the narrative, to read it to ensure or  
12 get an idea of exactly what we were submitting.

13 Q. Then I see this copy again indicating a  
14 "simple assault." Now it's got blue writing?

15 A. Yes, sir.

16 Q. Did you write that?

17 A. No, I did not.

18 Q. Do you know who did?

19 A. I do not. I do not know who did that.

20 Q. Okay. On this copy now, you can see from  
21 the top, it appears that -- and you know this, simple  
22 assault is a petty misdemeanor?

23 A. Yes, sir.

24 Q. And now someone has written in "aggravated  
25 assault with a weapon, false imprisonment, and

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1 battery," two felonies and one full misdemeanor;  
2 correct?

3 A. Correct. Yeah, if you look to the right,  
4 you'll see "Weapon," it says "none." And in reality,  
5 I believe the investigation revealed there might have  
6 been a handgun involved. So I would assume that's  
7 why it was changed.

8 Q. Well -- and do you know when this changed  
9 or who changed it?

10 A. I don't, I don't.

11 Q. The other blue writing on this report, do  
12 you know whose this is?

13 A. No.

14 Q. How did it get to your file?

15 A. This morning I was handed a copy by the  
16 Major, when I was looking for the copy that I had  
17 corrected. And I said, "This isn't the copy that I  
18 did, it must have been done in district," so --

19 Q. So who was the Major that actually handed  
20 this to you?

21 A. Daniel Lovato.

22 Q. Is it his changes then?

23 A. I don't think so, sir. I think it's the  
24 gentleman outside the door, the lieutenant and  
25 captain you have here, one of the two, and/or the

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1       sergeant.

2           Q.    Okay.  Now, this is clipped together.  You  
3       have Captain Thornton sending you an e-mail on June  
4       10th.  And it's copied -- who is Jimmy Glasscock?

5           A.    The Deputy Chief.  That's the chain of  
6       command.

7           Q.    Joseph Lovato?

8           A.    Major.

9           Q.    Mr. Skinner is a Lieutenant?

10          A.    Yes, sir.

11          Q.    And you have Sergeant Olson?

12          A.    Yes, sir.

13          Q.    "Rodella report.  Chief, I've attached a  
14       report for Sheriff Rodella with the attachments,"  
15       from Mr. Thornton.  This handwriting here, is this  
16       yours?

17          A.    Yes.

18          Q.    And this says, "At 6/10/14," it's a final  
19       report?

20          A.    Yes, that's the final version, approved  
21       version.

22          Q.    This final report, then, indicates what  
23       we've seen:  The alleged offense conduct has changed.  
24       And here, it bears signatures.  If this was done on  
25       June 10th, you have Orlando Sanchez and Kenneth

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1 Olson. What would the procedure be to have the  
2 reporting officer sign it, and his approving officer,  
3 if it was revised?

4 A. Well, once the -- the draft reports aren't  
5 signed. It's the final report that's signed. And  
6 many times -- I think there is two different ways to  
7 do it. Officers commonly -- in the system it doesn't  
8 allow for a physical signature, from what I recall.  
9 It's been quite some time since I've done a report.  
10 But they enter the date into that report. And then  
11 it's locked or closed. It looks to me like someone  
12 had ultimately printed this out, and it looks like  
13 Ken Olson, the Sergeant, signed for Orlando Sanchez,  
14 approving it.

15 Q. Is that permissible?

16 A. Yes, it is.

17 Q. Yesterday we had marked as Exhibit C the  
18 original report indicating a simple assault in this  
19 case, unlike the one that you have. It appears  
20 that -- we had testimony that Mr. Olson signed that,  
21 as well as Orlando Sanchez. And this was actually  
22 disseminated on an IPRA to -- and we'll call this to  
23 the media -- as a final report.

24 My question is, given that it was changed  
25 on June 10th, how is it that you have a different

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1 report --

2 MR. PENA: Objection to the  
3 characterizations of the testimony here, Your Honor.

4 THE COURT: Well, I'll let you clean that  
5 up, if it's necessary, on cross. But if Mr. Kassetas  
6 needs to change something, he can.

7 MR. GORENCE: Let me ask -- I'll have to  
8 start all over, since now I don't have the question I  
9 was going to ask.

10 Q. You can see that this, Chief, was the  
11 simple assault, uncorrected, signed off. And there  
12 was testimony yesterday from Mr. Olson that he signed  
13 off, and he concurred with this report. He concurred  
14 in its finding that there was a simple assault at  
15 stake here. That's why he signed it. Did you ever  
16 receive this?

17 A. No.

18 Q. Were you ever informed that the sergeant  
19 reviewed the work of the reporting Officer, Orlando  
20 Sanchez; concurred with it; and signed both of these  
21 documents -- he wasn't sure of the exact date -- but  
22 we have a situation where he signed this, and signed  
23 for Orlando first, and considered it a finalized  
24 report. Were you aware of that?

25 A. No, he signed -- it looks like he signed it

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1 after I had questioned it and reviewed it; when I  
2 determined or discovered that the date block was not  
3 completed.

4 So in my mind, on the 5th, when I read it,  
5 it was not an approved report. So someone must have  
6 talked to him, and he went in the system and signed  
7 off on it right away without reading it.

8 Q. So he said he reviewed it and approved it,  
9 and then had instructions to change it after that.  
10 What's the procedure for that?

11 A. Anytime a supervisor reads a report, and it  
12 has issues, be it either inaccurate or spelling or  
13 grammar errors, they can go in and instruct the  
14 patrolman to fix those errors. So that's probably  
15 what had happened.

16 Q. And you're saying this only occurred after  
17 the matter was brought to your attention by virtue of  
18 an FBI search warrant?

19 A. I believe the matter was brought to my  
20 attention by virtue of a news report that prompted me  
21 to ask for the report.

22 Q. Have you had any conversations with the FBI  
23 in this case?

24 A. A couple.

25 Q. Let's tell -- what conversations have you

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1 had?

2 A. Mostly about my personnel being involved in  
3 the investigation -- or testimony, subpoenas for a  
4 reconstructionist. As a matter of fact, they didn't  
5 contact me, I was told by my staff that they'd use  
6 one of my reconstructionists. That was about it.

7 Q. Well, let me go back. Who at the FBI did  
8 you converse with?

9 A. I talked to -- I was at a meeting at the  
10 FBI office about a week ago, and I spoke to -- I  
11 believe, the agent in charge of the case indicated  
12 that I may be subpoenaed. And that was really the  
13 extent of the conversation.

14 Q. Have you ever talked to the case agent in  
15 this case, Mr. Howard?

16 A. I believe that's who I talked to a couple  
17 weeks ago, yes.

18 Q. Let me go back. Did you ever talk to  
19 anybody from the FBI, prior to these reports being,  
20 as you said, fixed or amended, by a supervisor?

21 A. No, not before, no.

22 Q. Did you have any e-mail conversation with  
23 anybody from the FBI?

24 A. No. I believe we had -- my intention was  
25 after I read the report, knowing that the FBI was

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1 going to want the case file, and/or it would be  
2 IPRA'd to deliver a packet to the FBI to ensure they  
3 had all of the material that they may need. And I'm  
4 the one that reached out to them, and that was after  
5 the fact.

6 Q. Now, your boss is the Secretary, Mr.  
7 Fouratt; correct?

8 A. Yes.

9 Q. Did you talk to Mr. Fouratt about this  
10 case?

11 A. No.

12 Q. Now, as I understand it, the e-mails -- and  
13 this also comes from your report. And if I'm looking  
14 at this chain, I should start at the back. The first  
15 is an e-mail from DPS to you, "Copy of the report you  
16 requested. Boss, attached is the Michael Tafoya  
17 report." That's the 5th?

18 A. Yes.

19 Q. And then you have one from Thornton to you,  
20 copied, "Sir, we will get it fixed. Sergeant Olson  
21 is reviewing it. I will ensure it is a quality  
22 product before it's disseminated."

23 And then yours back right after that to  
24 Mr. Thornton, it says, "This is a big deal as far as  
25 the investigation goes." What do you mean by that?

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1           A. Well, it's a high profile case. Any case  
2 that the State Police works on a sitting sheriff, or  
3 a chief of police, is going to garner attention. So  
4 I wanted to ensure that we did the best job we could  
5 possibly do, and produce the best product.

6           Q. It ends, "You have an IPRA request on this,  
7 and I know the FBI wants to see it, so let's get it  
8 done." How do you know that the FBI wanted these  
9 reports?

10          A. I had called and asked them: Do you have  
11 our case file? They indicated no. I said, "Well,  
12 we'll get them to you once everything is complete."

13          Q. So if I understand this correctly, is that  
14 you first did your review as you indicated on your  
15 time line, the day afterwards, the 5th. And in your  
16 review, as the Chief, you marked areas in red -- make  
17 sure I get this right here. One where you marked in  
18 red, but you didn't see fit to change anything with  
19 regard to the fact that it was a simple assault.  
20 When you made your reviews, you didn't think that was  
21 appropriate?

22          A. I hadn't got that far. There is another  
23 e-mail where I say, I basically give up. "Fix this."  
24 I quit reading about three quarters of the way into  
25 it, because of the quality of the report. I just

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1 simply kicked it back to the supervisors and said,  
2 "You need to address this."

3 Q. Well, actually, on your red pages you've  
4 got the first sheet, and then every sheet after that  
5 goes through with red pen and marks your changes?

6 A. Yes.

7 Q. I assume you read the whole thing when you  
8 read it?

9 A. I did read the whole thing, yeah.

10 Q. And that would have included the front  
11 part, where it says, "Here's the type of offense"?

12 A. Yes.

13 Q. And all I'm saying is -- at least you as  
14 the Chief didn't see, when you were making your  
15 changes looking at it for quality control, you never  
16 thought the front had to be changed to reflect that  
17 actually there was a potential felony involved? That  
18 might be your opinion, but you didn't change it?

19 A. I didn't change it. You're right. That's  
20 a fact. You can see it right there.

21 Q. So after you decided there wasn't the  
22 potential for a felony referral to the DA's Office,  
23 you're saying someone else ultimately decided that  
24 may be important and they changed it, even though you  
25 didn't think it was appropriate?

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1           A.     I did not say that. I did not make any  
2 discussion or any decision on whether it should be a  
3 felony referred to the District Attorney's Office. I  
4 looked at the narrative -- I looked at the entire  
5 report. I focused on the narrative, and left it up  
6 to the district supervisors to work with the officer  
7 to address any deficiencies in the report.

8           Q.     I understand. But I'm saying, as you were  
9 red penning it, you didn't think anything was  
10 improper on the cover sheet?

11          A.     No, I didn't make any note of any notices  
12 or notations, correct.

13          Q.     You have handed me something called a  
14 "Dissemination Log"?

15          A.     Yes.

16          Q.     Generated today. What is that?

17          A.     I asked our records people to give me a log  
18 of the people that had printed or viewed that report  
19 in a PDF format.

20          Q.     So prior to June 4, only Officer Sanchez  
21 had looked at it?

22          A.     Yes.

23          Q.     This Gutierrez PIO. What is that?

24          A.     That's the Public Information Officer for  
25 State Police.

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1           Q.     Okay.  And then you have Officer Sanchez  
2     again would have reviewed it.  And I guess this is an  
3     electronic method of keeping track of who goes into a  
4     report?

5           A.     Yes, sir.

6           Q.     Then on the 6th, who is K Olson Maes?

7           A.     K Olson is the sergeant you've subpoenaed.

8           Q.     Okay.  K Olson.  And Maes?

9           A.     She's an administrative support person.

10          Q.     So the first time it would have been seen  
11     by Sergeant Olson was on the 6th, when it actually  
12     says it's dated that he reviewed it and approved it?

13          A.     I would say that the first time he went in  
14     the system and looked at it.  He may have seen it  
15     before, if it was printed out and provided to him.  I  
16     don't know.

17          Q.     Then you indicated Maes is who?

18          A.     Judy Maes is the secretary.

19          Q.     And Ms. Maes, Mr. Olson, Sanchez.  Then at  
20     the end, actually July 1st and the 7th you have W  
21     Shelton and C Valdez.  Who is that?

22          A.     Those are two investigations guys.

23          Q.     Now, it doesn't appear that your name shows  
24     up as ever accessing the document?

25          A.     No.

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1           Q.     And it doesn't show that the Captain  
2 Thornton nor Detective Skinner ever accessed the  
3 document?

4           A.     Probably because Judy Maes, the secretary,  
5 was asked to go in and get it. And I asked Manuel  
6 Gutierrez to provide it, as the e-mail --

7           Q.     Okay. I see. So now I understand it. So  
8 Mr. Gutierrez reports to you as the Public  
9 Information Officer?

10          A.     He does.

11          Q.     And he pulled it for you. And then  
12 Ms. Maes, she's the Secretary in District 7?

13          A.     Yes, sir.

14          Q.     Now, this is the e-mail you're talking  
15 about. You sent this out on June 6. "Please tell me  
16 this report has not gone out. It's horrible. I  
17 stopped looking at it after the last three  
18 paragraphs. Captain, please get this fixed."

19          A.     Yes.

20          Q.     And then what is this part? "This has not  
21 been released. We should all discuss exactly what  
22 we'll be releasing and what is a part of the case.  
23 Talk about it next week." That's from Regina Chacon.  
24 Who is she?

25          A.     She's the Bureau Chief for the records

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1 department, who receives all the IPRAs. And she's  
2 ultimately the one that releases any of the reports  
3 after they're redacted. So she's discussing with the  
4 group how -- what should be released.

5 Q. Finally, I think the last thing you handed  
6 me is another e-mail chain between you and  
7 Mr. Thornton. Correct me if I'm wrong, but the  
8 timing starts at the bottom from you, speaks for  
9 itself. "I want the report and all related documents  
10 PDF to me today. Need all copies."

11 Mr. Thornton addresses you as, "Chief,  
12 we're making more corrections to the report." It  
13 indicates that Officer Sanchez did not have audio  
14 recordings but had written statements.

15 And the last one from you, "As discussed is  
16 recoding and policy." What did that mean?

17 A. I misspelled, "As discussed in the  
18 recording policy." I'm talking about our recording  
19 policy, and how we interact with the public.

20 Q. What is the recording policy?

21 A. We have a policy that when we're  
22 recording -- or interacting with the public, that we  
23 should use our digital recorders to record  
24 interactions. And I had questioned why there were no  
25 audio recordings of the interviews that Officer

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1 Sanchez had done. He felt it was sufficient to use  
2 written statements, which will work.

3 Q. So it's not mandatory to record?

4 A. It is mandatory to record when we have  
5 interaction with the public, especially when it's a  
6 negative type of incident. But in an investigation,  
7 it's sometimes left up to the investigator. They  
8 don't have to every time.

9 Q. What I'm saying is Officer Sanchez was  
10 acting pursuant to his instructions; he didn't have  
11 to record this at that time?

12 A. I believe so, yes.

13 Q. If Officer Sanchez testified yesterday that  
14 he refused to sign the second amended report because  
15 he didn't agree with the changes, is that something  
16 that can be done by an officer, when he sees that  
17 it's amended later on?

18 A. Yeah. I believe the officer can dispute  
19 the changes made by a supervisor, if he doesn't agree  
20 with them.

21 Q. What's the procedure for that?

22 A. Usually, it's taken up to the next level.  
23 The lieutenant or captain gets involved. And  
24 ultimately, if it's a factual report, and it's an  
25 argument over grammatical issues or spelling, or

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1 whatever else, it can be resolved.

2                   If there is a change that totally affects  
3 the investigation, and the officer doesn't agree --  
4 which I haven't seen, it's pretty rare -- I believe  
5 we end up working it out internally. We fix the  
6 problem, find out why.

7                   Q. But in this case -- and I think you've  
8 answered it with your e-mail -- there was no FBI,  
9 U.S. Attorney involvement in terms of amending this  
10 complaint?

11                  A. No, there was not. And sir, you say  
12 complaint. Are you referring to the report? Because  
13 the complaint in my world is different.

14                  Q. Yeah. Thank you for that. The report, I  
15 should call it that?

16                  A. The report, yes.

17                  MR. GORENCE: I pass the witness, Your  
18 Honor.

19                  THE COURT: Thank you, Mr. Gorence.

20                  MR. GORENCE: I would like to get these  
21 copied. Do you need these back, Chief?

22                  THE WITNESS: I'd like them back. But if  
23 not, I can live with it.

24                  MR. GORENCE: I'm sure at the end of the  
25 hearing. I might need these to talk to or question

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1 Captain Thornton.

2 THE WITNESS: Oh, sure keep them.

3 MR. GORENCE: I'll leave them here.

4 THE COURT: Thank you, Mr. Gorence.

5 Mr. Pena, you have cross-examination of Mr.  
6 Kassetas?

7 MR. PENA: No, Your Honor, no questions.

8 THE COURT: Mr. Kassetas, you may step  
9 down. Thank you for your testimony. Is there any  
10 reason Mr. Kassetas cannot be excused?

11 MR. GORENCE: He should be, Your Honor.

12 THE COURT: Is it all right to excuse him?

13 MR. PENA: Yes, Your Honor.

14 THE COURT: All right. You're excused from  
15 the proceedings. Thank you for your testimony.

16 Where do you want to go now, Ms. Neda? Do  
17 you want another witness to get done quickly, or can  
18 we take a lunch break? What do you want to do?

19 MS. NEDA: These are Mr. Gorence's  
20 witnesses, Your Honor. And there is a Captain and a  
21 Lieutenant. But you know what, Mr. O'Brien is still  
22 here. And my cross of him is like five minutes. And  
23 I hate to keep him waiting. It's just that Chief  
24 Kassetas had a 1:00 appointment to select the medical  
25 chief. So that's why I was asking.

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1                   THE COURT: All right. Do you want to  
2 finish up Mr. O'Brien?

3                   MR. GORENCE: If I could weigh in. I'd  
4 like that. He's obviously hourly. He's on a  
5 retainer. I'd like to make sure he can get on his  
6 way, and then maybe we can have lunch and argue  
7 what's applicable later.

8                   THE COURT: All right. Mr. O'Brien, if  
9 you'll come up and resume your place in the witness  
10 box, and I'll remind you that you're still under  
11 oath.

12                  THE WITNESS: Yes, sir.

13                  THE COURT: Ms. Neda, if you wish to  
14 cross-examine Mr. O'Brien.

15                   CROSS-EXAMINATION

16                  BY MS. NEDA:

17                  Q. I just have one area of inquiry, because I  
18 understand the Court's ruling regarding statements  
19 Junior made to you, and so we're limiting your  
20 opinion. And that is --

21                  THE COURT: What ruling have I made  
22 regarding --

23                  MS. NEDA: I thought you indicated with  
24 respect to the acceleration that he can't get beyond  
25 that. The capability -- there are two parts to this

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1 witness' testimony.

2 THE COURT: Well, I haven't made any  
3 rulings. So don't let me mislead you in any way. I  
4 just -- everybody was trying to abbreviate the stuff.  
5 And I just was pointing out that I had less problems  
6 with the acceleration between the Jeep and the Mazda,  
7 the differentials there; that didn't seem to me to be  
8 a big area of dispute, or I didn't really have a  
9 problem with it.

10 MS. NEDA: All right.

11 THE COURT: But it's all fair game. You're  
12 welcome to argue and try to exclude as much or any.  
13 I'm not trying to cut off your argument in any way.

14 MS. NEDA: No, Your Honor. The question I  
15 simply had with respect to this witness on the first  
16 one, the first point -- there are two points -- there  
17 are two areas in which this expert gives opinions.  
18 One is he gives an opinion -- actually, it's not an  
19 opinion. He reports to us from a proper factual  
20 source, I assume, the acceleration capabilities of  
21 two vehicles involved in this case. That is very  
22 benign. The United States doesn't have a problem  
23 with that. Although we may discuss its relevancy at  
24 a later date or a later time.

25 But the other part of that first part is

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1 that the expert witness went forward with that  
2 information, knowing the acceleration capabilities of  
3 these two vehicles, and started describing how these  
4 cars would have traveled, and whether there would  
5 have been a gap, and so forth. And he bases that  
6 solely on Rodella, Jr.'s information to him. He has  
7 no other facts.

8 It is that latter part that the Court also  
9 expressed concern about that I took the Court to say  
10 that he would not be testifying about that. And that  
11 was how I would cross-examine this witness about that  
12 anyhow, because all he's doing is listening to the  
13 defendant's son tell him how these cars traveled.  
14 That is not a proper basis. It's very self-serving.  
15 And until and unless Mr. Rodella, Sr. or Mr. Rodella,  
16 Jr. testifies, I would object to that portion of the  
17 opinion.

18 The second part of the opinion -- and so  
19 there is nothing to cross-examine the witness on with  
20 respect to that.

21 The second part of his opinion has to do  
22 with the vehicle's movement on that dead-end road.

23 BY MS. NEDA:

24 Q. Right, Mr. O'Brien?

25 A. Yes.

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1           Q.    Okay.  And so with respect to that, we may  
2 have arguments regarding relevancy or helpfulness to  
3 the jury.  But with respect to his opinion, the only  
4 cross-examination I have is, you used the word  
5 "aggressively."  And my experience has been that's  
6 not a word often used by accident reconstructionists.  
7 So my question to you is when you were describing the  
8 movements of this vehicle, you weren't using  
9 scientific or more technical terms to describe the  
10 motion of this car.  You used an adjective,  
11 "aggressively."  Mr. Gorence repeated it four times.  
12 My question to you is, did someone suggest to you  
13 that you use that word "aggressively" in your report  
14 to describe the vehicle's motion?

15           A.    No, ma'am.  I was going to use "violently,"  
16 and I chose to go with the lesser word of aggressive.

17           Q.    All right.  Now, let me ask you, is that a  
18 word you commonly use when you are describing a  
19 forceful movement of a car?

20           A.    It is a word that I use describing this  
21 type of performance of the vehicle.

22           Q.    And can you give me an example, any  
23 particular case come to mind where you have described  
24 a vehicle's motion, as an accident reconstruction, as  
25 aggressive?

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1 A. Repeat your question.

2 Q. Surely. Can you cite to any case where you  
3 have rendered an opinion involving the forceful  
4 moving of a vehicle, and you used the word  
5 "aggressive" to describe the movement of that  
6 vehicle, as an expert witness?

7 A. I've used it many times over my career, but  
8 I don't recall a specific case right now.

9 Q. But it is your testimony you usually do use  
10 the word "aggressive"?

11 A. When it applies --

12 Q. Okay.

13 A. -- I do use it.

14 Q. In that case --

15 A. I will tell you, ma'am, that it's not very  
16 often that I see vehicles do this type of maneuver,  
17 where a driver will accelerate in this fashion, such  
18 a violent maneuver, with enough force to swing the  
19 vehicle around 180 degrees. That doesn't happen very  
20 often. So it is rare when I have to use those type  
21 of terminology. But it does apply in this case, in  
22 my opinion.

23 Q. Are you certain of your opinion to a  
24 reasonable degree?

25 A. Yes, ma'am.

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1           Q.     Okay.  And there weren't that many  
2     photographs in this case; right?

3           A.     There is actually plenty that provide  
4     different vantage points of the tire mark evidence in  
5     the dirt, which easily allow me to make the opinion.

6           Q.     So you see those photographs as having  
7     forensic value?

8           A.     Yes, I do.

9           Q.     Do you know who took these photographs and  
10     under what circumstances?

11          A.     I believe it was one of the deputies, as a  
12     result of the culmination of the event and  
13     photographing to document the position of the road --  
14     the drive in the dirt, the scene, if you will --  
15     right after the event.

16          Q.     Someone trained in taking photographs of an  
17     accident scene?

18          A.     A police officer with some type of  
19     training, I would hope so, yes, since he was in  
20     possession of a camera, taking pictures.

21          Q.     Is that your information?

22          A.     Yes.

23          Q.     That this person was trained in taking  
24     photographs, the degrees, the number of photographs,  
25     the 360 around the vehicle --

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1 A. No, ma'am.

2 Q. -- the degree to the perpendicular plane,  
3 these kinds of things, you're confident that the  
4 person that took the photographs took all of those  
5 into consideration?

6 A. No, ma'am. I'm simply stating that the  
7 police officer took photographs at the scene.

8 I know from the Police Academy, they do  
9 teach officers how to take basic photography. So  
10 that is what my opinion is, likely, the training  
11 level of anyone that takes photographs as a police  
12 officer on scene. I'm not saying that the officer  
13 had advanced techniques or advanced training in  
14 photography, just simply that the officer did take  
15 photographs at the scene, which did assist me in this  
16 case in looking at the evidence in the dirt --

17 Q. Okay.

18 A. -- and the vehicle's position.

19 Q. He took photographs?

20 A. Yes, ma'am.

21 Q. And they had a forensic value, as opposed  
22 to other photographs, because why? If I took a  
23 photograph of something of that scene, would you find  
24 that to have forensic value?

25 A. Well, it depends what's contained therein,

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1 in the photograph.

2 Q. Okay.

3 A. If it captures evidence in the scene, then  
4 it's forensically valuable.

5 Q. All right. And in your opinion, there was  
6 sufficient number of photographs and of sufficient  
7 forensic value for you to render this opinion?

8 A. Yes.

9 MS. NEDA: Okay. Thank you.

10 THE COURT: Thank you, Ms. Neda.

11 Mr. Gorence, do you have any redirect?

12 MR. GORENCE: I have no other questions,  
13 Your Honor.

14 But I did want to make it clear to Ms. Neda  
15 that the same concerns that I articulated about  
16 Overby, he will -- if the Court finds that he has the  
17 requisite qualifications on issues that are relevant  
18 in this case, I concur with Ms. Neda that I don't  
19 believe I could bootstrap, for the very same concerns  
20 I had about Mr. Overby. He will have to listen to  
21 the testimony of Mr. Rodella, Jr., and potentially  
22 Mr. Rodella, which he didn't talk to, in forming his  
23 opinions. That would be based on sworn testimony,  
24 any expert can do.

25 The basis of the report -- and he can

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1 modify those opinions, if in fact, Mr. Rodella,  
2 Jr. -- theoretically the Sheriff -- Mr. Rodella,  
3 Sr. -- gave contrary opinions. But the point, as I  
4 understand the 16(b) disclosure, here's what he has  
5 based on these assumptions. And of course, if Mr.  
6 Rodella contradicted, in all respects, what he told  
7 Mr. O'Brien, then obviously Mr. O'Brien would have to  
8 modify his opinion. I can't do that until he  
9 testifies. And I'm not trying to bootstrap  
10 information that I believe would be hearsay.

11 So I want to make it clear this is an  
12 opinion based on proposed testimony that would be in  
13 all respects similar, in which Mr. O'Brien would have  
14 to listen, and if required, modify an opinion, if Mr.  
15 Rodella said something differently. And I think that  
16 accommodates what Ms. Neda was talking about.

17 THE COURT: All right. Mr. O'Brien, you  
18 may step down. Thank you for your testimony.

19 THE WITNESS: Thank you, sir.

20 THE COURT: All right. We'll take our  
21 lunch break. See y'all at about a quarter till 2:00.  
22 And we'll try to conclude the matters this afternoon.

23 (The lunch recess was held.)

24 THE COURT: All right. Mr. Gorence, do you  
25 want to argue your -- in support of Mr. O'Brien?

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1 MR. GORENCE: Yes, Your Honor.

2 Your Honor, we aren't at that stage yet  
3 where we're looking at jury instructions. But  
4 obviously the Court understands that the quantum of  
5 force with a Sheriff, who is on duty 24/7, there  
6 is -- we submitted jury instructions that it depends  
7 on the situation with which he's confronted.

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1                   And the idea of a high-speed pursuit, where  
2 one vehicle can keep up with another that's trying to  
3 get away, is important in this case to show that  
4 that's not really what happened nor transpired.

5                   Two, the photographs, particularly with the  
6 other vehicle's specifications about the front-wheel  
7 drive, that's the whole -- that's the issue here.  
8 What was confronted by a law enforcement officer.

9                   And again, this testimony will be after he almost  
10 caused an accident, when he entered onto Highway  
11 399 -- this is Mr. Tafoya -- almost caused a second  
12 accident, when he tried to overtake a vehicle making  
13 a left turn off of 399. He then stopped. As he  
14 skidded out on the gravel, he clearly -- and I think  
15 even the Government now is going to concede -- I  
16 don't know what they're going to concede, I shouldn't  
17 say that -- that he's driving on a plate that is not  
18 licensed in the State of New Mexico. It's expired.  
19 And he -- maybe they'll persist in this. And I  
20 think, again, that will be an issue for the jury.  
21 And as he takes off, it is highly relevant what  
22 transpires when Mr. Tafoya -- he had numerous places  
23 during daylight to pull in, if he was scared of  
24 someone pursuing him and wanted a witness. We'll  
25 show that there is approximately -- there is over 100

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1 places he could have stopped to pull into houses in  
2 which there were people, you know, there, out, all  
3 the rest of it. Because it's an evening where -- and  
4 it's not dark yet.

5 He chooses not to do that. And he  
6 ultimately -- and again, I'm proffering -- the route  
7 as it dead-ends before he hits Santa Clara Pueblo,  
8 there is three ways to go. In his zeal to flee, he  
9 chooses a route, and then engages in highly  
10 aggressive driving, to the point where the Sheriff --  
11 and there will be testimony, and this is what's so  
12 critical, because the use of force is an element in  
13 this case. And a law enforcement officer can respond  
14 to a perception of, if deadly force is being applied,  
15 they can use deadly force in response.

16 In this case, that is the quintessential --  
17 it will be one of them -- we have a Fourth Amendment  
18 claim, the Government will have to cross that  
19 threshold first. Then we get into the use of force.  
20 Well, the only way you can evaluate that is by what  
21 Sheriff Rodella confronted at that time.

22 Mr. O'Brien's testimony is critical. And  
23 again, someone who the Government, as I said -- and I  
24 didn't even know this when he was retained -- I did  
25 not know that he'd been an expert for the United

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1 States Attorney's Office. And we have photographs  
2 that are completely relevant to what happened at the  
3 scene. And you've heard the testimony that's been  
4 proffered.

5 Your Honor, this is what traffic  
6 reconstructionists do day in and day out, and analyze  
7 photographs, accident or other scenes, to see how did  
8 this occur. Because without this testimony, we'll  
9 have all these photographs depicting circular tire  
10 marks. And Mr. O'Brien has described how they  
11 occurred, Your Honor. And we won't know how they  
12 occurred. How do we get a circle that goes around  
13 180 degrees? How does he end up high-centered on  
14 this pole? And this will dovetail to testimony in  
15 the case.

16 But I'm saying that's -- it will be the  
17 issue that the jury will confront, which was what did  
18 Sheriff Rodella confront when a car is driving in an  
19 aggressive -- and in fact, you heard his testimony.  
20 He tempered this. He was going to say violent, but  
21 notched it down a stage, in terms that he uses day in  
22 and day out.

23 So as I understand it, just to summarize,  
24 we do not have a challenge on Mr. O'Brien's  
25 qualifications; that he is a bona fide traffic

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1 reconstructionist. We only have an issue with regard  
2 to his analysis of scene photographs. Without the  
3 benefit of an expert, the jury will be left without  
4 the basis to understand how these tire marks  
5 occurred.

6 Again, Your Honor, we had an open -- we had  
7 an expert deadline. This is so important that I  
8 offered the opportunity for the Government -- and let  
9 me pull the date that I -- I should probably read  
10 this into the record, because I thought it was so  
11 important. It's dated September 10th, this  
12 Wednesday, Your Honor, last Wednesday. When I  
13 offered -- because this is a question, if the  
14 Government wanted to respond with another comparable  
15 expert, they had the opportunity.

16 I have no problem, and I'm reading from  
17 what I sent. And I want to put this into the record.  
18 It was sent at 1:42 p.m. to Ms. Neda and Mr. Pena.  
19 Dear Ms. Neda and Mr. Pena, I received a call from  
20 Dennis O'Brien, the traffic reconstruction expert  
21 retained in this matter, concerning a phone call he  
22 had today with Agent Howard. As I understand it,  
23 after answering a question regarding photographs that  
24 he was provided with, Mr. O'Brien declined to answer  
25 any further questions until I was made a part of the

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1 conversation. I have no problem with you and/or  
2 Agent Howard interviewing Mr. O'Brien, provided that  
3 I am present, and as long as I'm afforded the same  
4 opportunity to interview your expert Manuel Overby.  
5 I have no problem with you tape-recording the  
6 conversation with Mr. O'Brien, as long as I can do  
7 likewise with Mr. Overby." And it goes on. "If you  
8 don't want tape-recordings, I will bring my  
9 investigator, as you will bring yours. Please let me  
10 know what you'd like to do as soon as possible."

11 I received no response to that. So, Your  
12 Honor, this is an issue where I feel like the  
13 Government had the opportunity to interview, and if  
14 need be, file a late notice as another expert. If  
15 they wanted to get a traffic reconstructionist who  
16 had a contrary view, they certainly had that  
17 opportunity.

18 But it goes to the quintessential issues in  
19 this case. And we're now largely really relevance  
20 under 401 -- I should say relevance and probative  
21 value under 401 and 402. This is not a Daubert  
22 issue. Does it touch on issues that will be  
23 presented to the jury, and does the expert opinion  
24 aid the jury in their determination?

25 And to be frank, Your Honor, it is the

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1 issue, which was what was the Sheriff confronted  
2 with, with a driver engaging in the conduct that  
3 Mr. Tafoya engaged in.

4 If you have any questions, the rest of it  
5 is contained --

6 THE COURT: Not at the present time. Let  
7 me see what Ms. Neda says. Thank you, Mr. Gorence.

8 Ms. Neda.

9 MS. NEDA: What we have, Your Honor, is  
10 relevance here. Without knowing where Mr. Rodella  
11 was during a circle made by a Mazda, why is this  
12 relevant? We both know, we both concede that one car  
13 was in front of the other. The eyewitness saw the  
14 defendant chasing the Mazda on this dirt lane. So  
15 the question isn't whether or not the victim had to  
16 turn abruptly to avoid him. We concede he was trying  
17 to get away from the people that were following him,  
18 as he knew, just two men in an unmarked vehicle, in  
19 plainclothes.

20 So the only way it would be relevance,  
21 because right now I'm understanding Mr. Gorence to  
22 say that the relevance is that this abrupt movement  
23 to get away from Mr. Rodella was evidence of some  
24 assault on Mr. Rodella. That would be relevant if  
25 Mr. Rodella testifies he was standing somewhere next

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1 to the car and it was coming at him.

2 So I don't see how, without the evidence as  
3 to when the circle was made, and who was nearby, why  
4 it bears on anything regarding the reasonable force  
5 employed by Mr. Rodella.

6 Indeed, the testimony will be from the  
7 victim that the defendant got out of the passenger  
8 car, jumped out, came running at him with a gun in  
9 his hand before he made that abrupt movement.

10 Mr. O'Brien, he doesn't know that, or he  
11 wasn't probably told that. But with that version,  
12 why is the abrupt movement relevant to this case?

13 The gun was already in the hand of the  
14 defendant before the evasive action was taken by  
15 Mr. Tafoya, who found himself in a dead-end road.

16 If there is somebody that's going to  
17 testify differently -- if Junior or the defendant  
18 takes the stand and says, I was standing right there  
19 and he aimed at me on purpose, well, then perhaps,  
20 the witness -- the expert witness can come after that  
21 and say, Well, there were these very abrupt  
22 movements.

23 The United States is not contesting that  
24 the victim was trying to get away from these two men.  
25 Clearly, he wasn't driving on a Sunday afternoon.

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1                   Again, the relevance would be in what  
2 context was this maneuver made. And Mr. O'Brien  
3 doesn't know that. And without knowing that -- also,  
4 quite frankly, he relies on very few photographs  
5 taken by someone not shown to be schooled in taking  
6 accident scene photographs, which is a matter for  
7 cross-examination later.

8                   But quite frankly, without him putting it  
9 into context, it isn't relevant.

10                  THE COURT: All right. Thank you, Ms.  
11 Neda.

12                  What issue in dispute does this go to?

13                  MR. GORENCE: The issue in dispute, Your  
14 Honor --

15                  THE COURT: What do you expect the  
16 Government to dispute about your version of events  
17 that Mr. O'Brien is going to help you with?

18                  MR. GORENCE: Well, Your Honor --

19                  THE COURT: If they're not disputing that  
20 he was running away from Mr. Rodella and driving  
21 fast -- you don't have to put it in terms of  
22 aggressively or violently -- but driving fast to get  
23 away, what does Mr. O'Brien give you?

24                  MR. GORENCE: Your Honor, there will be,  
25 obviously, an issue in this case as to the Sheriff

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1 identifying himself as the Sheriff, who we've  
2 indicated, again, was on duty 24/7.

3 THE COURT: But Mr. O'Brien --

4 MR. GORENCE: He was not a fact witness,  
5 Your Honor. And I concede that. But the issue -- I  
6 mean, it will be contested that even the neutral  
7 witness, the person where this car ultimately  
8 stopped -- his name is Mark Thompson, he's on the  
9 Government's list, he's on our witness list -- he was  
10 interviewed initially, and then he was even  
11 interviewed by Mr. Sanchez.

12 And the Court can look at Exhibit C, where  
13 we have the first report, or even the second report,  
14 where Mr. Thompson describes -- and I'm going to read  
15 this -- that the Sheriff -- Mr. Thompson said the  
16 Jeep that was doing the chasing approached him. And  
17 the passenger -- that's Mr. Rodella, because he  
18 clearly wasn't driving -- immediately identified  
19 himself as the County Sheriff by showing him his  
20 badge.

21 So we have -- I just want to let -- at  
22 least the neutral witness, in terms of what he told  
23 Mr. Sanchez -- and we've got other reports -- he  
24 identifies himself as the Sheriff. Mr. Thompson  
25 said, "He got out of the way and told the Sheriff to

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1 proceeded. Mr. Thompson said the small car was driving  
2 aggressively." So this is the independent -- I'm  
3 reading from -- this is now page 5 of the first New  
4 Mexico State Police report. And it would be on the  
5 second report --

6 THE COURT: Well, is that your point, is  
7 that you think Mr. O'Brien helps you go from driving  
8 fast to driving aggressively, or as he first said,  
9 violently? It's the gradations that you think  
10 Mr. O'Brien gives you?

11 MR. GORENCE: Exactly, Your Honor. Because  
12 he's going to corroborate the neutral witness as to  
13 the who -- the small car was driving aggressively and  
14 came to the road and dead-ends at the house.

15 "Mr. Thompson said the Sheriff in the Jeep  
16 stopped and attempted to approach the car. But the  
17 driver of the car avoided the Sheriff." This is  
18 again from the State Police report.

19 I have talked to Mr. Thompson -- our  
20 investigator -- avoiding the Sheriff was exactly what  
21 Mr. O'Brien is going to talk about, in that he is --  
22 and there is going to be a dispute because his badge  
23 is out; he is identifying himself as the Sheriff,  
24 again with someone with a motive to flee, and  
25 engaging in this kind of -- almost two deadly

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1 accidents. And the Sheriff identifying himself. So,  
2 as I said, only an independent witness says that  
3 here's what happened with the Sheriff showing his  
4 badge, his badge out.

5 Then, I want to proceed -- because this is  
6 what's so important, Your Honor -- "Mr. Thompson said  
7 the small car hit the steel pipe where it stopped."  
8 This is at page 5 now of the report. Again, we've  
9 got various versions, but it's in both the first and  
10 the second. Mr. Thompson said, "The driver of the  
11 small car -- the driver of the car tried to drive  
12 over the pipe, but was unable to. Mr. Thompson said  
13 the Sheriff identified himself to the driver." So  
14 this is our neutral witness, according to the State  
15 Police report given by Mr. Sanchez, when he  
16 interviewed him. So we have a Sheriff identifying  
17 himself, under color of law, as the Sheriff. "And  
18 pulled him out of the car. Mr. Thompson said he saw  
19 it clearly."

20 And this aggressive driving on his part, as  
21 the Sheriff is approaching -- the Government said he  
22 pulled his gun out. There is going to be testimony  
23 that his gun was out. They didn't test the gun for  
24 DNA. They tested the badge. But this is the issue  
25 in the case, that if a Sheriff -- and we've got all

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1 of our jury instructions -- he's confronted with  
2 deadly force. And there is New Mexico case law that  
3 we'll be submitting as additional, that a car can be  
4 a deadly weapon. Mr. Tafoya was using this car as a  
5 deadly weapon. And the testimony of an accident  
6 reconstructionist, as he looks at the scene  
7 afterwards, supplies that factual basis.

8 Because the reality is, the Sheriff, it's  
9 our position, could have used deadly force at that  
10 point, when Mr. Tafoya tries to run him over, after  
11 he has identified himself as a law enforcement  
12 officer. That's the basis for it.

13 Now, the Government's concern by Ms.  
14 Neda -- I actually concur, and I have to tell you  
15 that Mr. O'Brien will be here additionally -- maybe  
16 he's going to sit here for the whole trial -- but  
17 he's going to hear the testimony of Mark Thompson,  
18 the person who I've just read. Because it kind of  
19 relates, and I want to get his perspective as well on  
20 some of that. Now, I don't have -- I haven't  
21 provided every statement of Mr. Thompson's. But I  
22 want to hear the under oath statement, so that  
23 Mr. O'Brien can factor that in, as well as the  
24 Sheriff's testimony, and as well as his son, Mr.  
25 Rodella, the eyewitnesses here, of which there is

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1 three. There is actually four. Mr. Thompson's son,  
2 David, who is 13, called 911. He's not on our list.  
3 He's not on the Government's list, so he obviously  
4 won't be called. But he was a distant eyewitness.

5 But that's the issue, Your Honor. And if  
6 the Government, as I hear it now -- this is now --  
7 they're not claiming that he doesn't have  
8 qualifications. They're not claiming that it might  
9 not be relevant. They're claiming that it's based on  
10 hearsay, which is why he will be here to hear the  
11 under oath sworn testimony minimally -- well, of  
12 every eyewitness, of which there is only three: Mr.  
13 Thompson, Sheriff Rodella and his son.

14 THE COURT: But the key word -- the key  
15 thing you're getting out of Mr. O'Brien is when he  
16 says the word "aggressively." That's the big thing  
17 that's disputed here is -- because they're conceding  
18 he's driving fast.

19 MR. GORENCE: No, but see, fast is the  
20 three miles from where the interaction first started,  
21 Your Honor, to where it ended. Mr. Thompson, who  
22 uses the word "aggressive," as well -- but, of course  
23 he's not -- he can describe that, but he's not an  
24 accident reconstructionist. What we need to describe  
25 is what happened at the dead-end when Mr. Tafoya ran

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1 out of road.

2 I'm going to wait, because I can't actually  
3 talk. I'll wait. Are you done?

4 MS. NEDA: Well, I --

5 THE COURT: Mr. Gorence. No, no. You  
6 direct your comments to the Court, not to Ms. Neda.  
7 If you have a complaint, you can raise it with me. I  
8 don't think they're speaking too loudly. So be  
9 careful about appealing to the Court too much on  
10 that.

11 MR. GORENCE: I'm not -- I'm sorry, Your  
12 Honor, I'm having a hard time concentrating when I  
13 hear this kind of background noise.

14 No, Your Honor, the issue -- Mr. Thompson,  
15 as a lay witness, will talk about aggressive driving.  
16 And I'm not talking in the course of the three mile  
17 pursuit. I'm talking about what transpired at the  
18 dead end of Mr. Thompson's property. Because there  
19 will be a lot of testimony about -- and there is  
20 another thing. The Sheriff did not follow all the  
21 way in what Mr. Thompson is now trying to escape --  
22 excuse me, Mr. Tafoya is trying to escape. The  
23 Sheriff got out of his car. There will be testimony  
24 about the distances. Because the only tire marks are  
25 those left by Mr. Tafoya. And as he approached the

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1 Tafoya vehicle, you've heard what happened is that he  
2 is gunning it in reverse, spinning 180 degrees. And  
3 there will be testimony that it almost strikes the  
4 Sheriff, as this vehicle is trying to hit him. And  
5 what transpired then.

6 What is critical is that the 180 degree in  
7 the tire marks; that -- he can say, I'm trying to get  
8 away, and I guess if he doesn't know that this is the  
9 Sheriff, and he's entitled to hit a pedestrian who is  
10 after him, I mean, I guess that's their testimony --  
11 but the Fourth Amendment inquiry is that a person who  
12 is on duty who sees two near accidents, and is  
13 pursuing that, and then approaches a vehicle with --  
14 the testimony will be with the badge out, after  
15 having identified himself, and the driver then tries  
16 to run him over by this aggressive driving -- and the  
17 question then is for the jury: What's the reasonable  
18 amount of force that can be used? That's the --  
19 after you get past the Fourth Amendment, the stop,  
20 you have the question about the quantum of force.

21 And we've -- again, this isn't a jury  
22 instruction, but that's what Mr. O'Brien's testimony  
23 relates to as he analyzed those photographs.

24 Otherwise, Your Honor, without that, we  
25 have the testimony of either the Sheriff or his son.

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1 I'm sure the Government will attempt to impeach that.

2 I feel like I will attempt to impeach Mr. Tafoya.

3                   But we don't have someone objective who can  
4 say: Here is how they are created with a front-wheel  
5 drive vehicle. We won't have someone to testify that  
6 you can see the last photograph, the wheel is  
7 embedded in the ground by trying to get away with --  
8 he called it the aggressiveness, or the violence of  
9 trying to get away. All of that is relevant to the  
10 jury's determination in that situation, with a law  
11 enforcement officer. What's the quantum of force  
12 that can be used to stop someone engaged in that kind  
13 of conduct?

14                   THE COURT: All right.

15                   MR. GORENCE: Thank you, Your Honor.

16                   THE COURT: Thank you, Mr. Gorence.

17                   Well, it seems to me that this isn't really  
18 a Daubert issue. This seems to me to be pretty  
19 run-of-the-mill accident reconstruction. Different  
20 people put different value on the art and science.  
21 But it seems to, by and large, survive Daubert  
22 challenges. And this one doesn't seem to raise  
23 anything unusual.

24                   I think that it's marginal what it adds to  
25 the case. But the photographs will be in evidence,

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1 and if it assists the defendant in some way to have  
2 him testify that these tracks were not made by  
3 somebody just driving fast, but driving aggressively,  
4 then that may provide some marginal factor in the  
5 calculus of what force is reasonable. So I'm not  
6 going to exclude Mr. O'Brien or his testimony, but  
7 we'll take his testimony the same way that we talked  
8 about, that he'll come after either both Rodellas  
9 testifying, or at least Rodella, Jr.

10 Now, the way I look at things, we have  
11 dealt with everything other than the objections to  
12 the United States' requested jury instructions and  
13 finishing up on the motion to disqualify. Is there  
14 anything else that's out there that we need to deal  
15 with, Ms. Neda? Mr. Pena?

16 MS. NEDA: Yes, Your Honor. Just one  
17 thing. But the United States also filed a Rule  
18 404(b) -- sort of reverse 404(b) -- requesting  
19 that -- just out of extra caution -- requesting  
20 permission to ask to introduce into evidence that  
21 this victim had a valid driver's license, was a  
22 United States citizen. His car was registered  
23 lawfully, it was lawfully insured. There were no  
24 pending arrest warrants. And he has no criminal  
25 history. All of these things go into his lack of

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1 motive to flee from a law enforcement officer, had he  
2 known it was a law enforcement officer. This is more  
3 like res gestae, now that the Court has mentioned  
4 this as of yesterday, because the state of -- his  
5 status at that time is evidence, but part of the  
6 motive for him to plea part of this particular case.  
7 That motion came under, as I said, a reverse 404(b)  
8 motion. Do you know what docket number that is? I  
9 can't think right now what the docket number is. But  
10 I think it probably is moot in that it truly is a res  
11 gestae matter. Allow me to find --

12 MR. GORENCE: I don't object to any of it.

13 THE COURT: Well, yeah, given that you're  
14 going to go after him about what he was thinking, I  
15 think those are fair game.

16 MS. NEDA: All right.

17 THE COURT: So we'll just -- I'll grant  
18 your motion, and you can go into those areas.

19 MS. NEDA: All right. The only other thing  
20 pending was -- not really pending -- but when we were  
21 talking about 404(b) that is part of the defense  
22 motion under 404(b) to permit evidence into the trial  
23 about registration, we don't, of course, object to --  
24 as the Court knows -- res gestae information. That  
25 is the time, whether or not he was lawfully

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1 registered, the car was lawfully registered, and  
2 insured. However, Mr. Gorence also mentioned three  
3 prior occasions. And in his motion -- I believe it  
4 may have been a notice -- but in any event in the  
5 pleading it states that the victim has driven at  
6 least on three occasions -- has been caught driving  
7 at least on three other occasions with an  
8 unregistered car. That is not correct, number one.  
9 He's only been caught once doing that. The other  
10 time was he just didn't have the paper, and it was  
11 dismissed. So twice he's had dismissals, because he  
12 was lawfully registered. Another time he paid the  
13 fine for not having a lawfully registered vehicle. I  
14 think that was back in 2010.

15 Here's my point: Those three instances  
16 would be other acts evidence. And they prove  
17 nothing, because it didn't involve flight. It didn't  
18 involve any punishment on the two occasions when he  
19 lawfully was registered. And in this case, we can  
20 prove he was lawfully registered. And the one time  
21 that he truly was deserving of a citation -- and he  
22 got a citation, and he paid a \$200 fine, I believe --  
23 was a time that he did not flee. So it doesn't have  
24 any relevance.

25 And under the 403 balancing, I think what

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1 it merely does is inject some prior bad acts of the  
2 victim, when there is so few instances that the  
3 defense obviously can find that are bad acts of this  
4 victim. So I would ask that, although Mr. Gorence  
5 obviously should be permitted to ask about the  
6 current status of the car or the status of the car on  
7 the day of March 11, that back in 2010 or 2011, he'd  
8 be disallowed, because that truly would be 404(b).  
9 And I see no valid purpose to introduce it into  
10 evidence.

11 THE COURT: Mr. Gorence?

12 MR. GORENCE: Your Honor, as the Government  
13 has conceded, there will be a big issue about his  
14 invalid tags here. Maybe they're backing off with  
15 the idea that he really had one, now that they've  
16 looked at the dispatch and realized how the tow  
17 records -- this is classic. This shows his intent to  
18 flee. This shows that he has been charged -- doesn't  
19 matter, as we talked about yesterday, the fact that  
20 on the Government's 404(b) that no one made any  
21 complaints at the time, that there were no citations  
22 issued, that nobody was convicted.

23 In this case, Mr. Tafoya was charged three  
24 times with the very same thing that occurred here,  
25 which is he doesn't have a valid tag on a vehicle to

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1 be driven. That -- I mean, the jury will weigh, one,  
2 if that's true; two, that's his basis to get out of  
3 dodge in a fast car; and three, the fact that this is  
4 his motive, his intent to flee is based on this is a  
5 fairly common occurrence. It doesn't matter that  
6 he's been convicted. He's been charged three times  
7 with the same offense. And I certainly intend to  
8 cross-examine Mr. Tafoya about that, because  
9 otherwise, the jury doesn't really understand why he  
10 was so -- I don't want to use hell-bent -- why he was  
11 so steadfast in fleeing from someone identifying  
12 himself as law enforcement.

13 That's one of the issues in the case. I  
14 mean, they can call it a chase. And I think the  
15 evidence will be that he was engaging in flight,  
16 after nearly causing two accidents, deadly accidents.

17 And once there was a person who -- and I  
18 need to put this in context, Your Honor -- see, the  
19 testimony will be that after he -- the second near  
20 accident, when he almost wiped out, Sheriff Rodella  
21 got out and walked towards the car with his badge  
22 out. This doesn't end up with a badge at Mr.  
23 Thompson's property. It's further, 3.1 miles up on  
24 399, after witnessing two near deadly crashes, the  
25 Sheriff approaches -- or the jury will hear evidence

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1 of this -- you're not the fact finder, but the jury  
2 will hear that, as he approached with his badge out,  
3 and got very close to the car, is when Mr. Tafoya  
4 decided to peel out again and start his flight.

5 The evidence is that he then realized there  
6 was a law enforcement officer; that he's going to be  
7 cited for his near deadly accidents. And yet again,  
8 the basis for the flight, in addition to how he's  
9 driving, is that he doesn't have a tag on. And  
10 something that has happened in the past.

11 So that's the relevance. And specifically,  
12 I want to articulate the Huddleston factors. It  
13 clearly goes to motive for his flight, the fact that  
14 this has happened before. He understands the  
15 consequences of having to pay \$200. Maybe sometimes  
16 he gets lucky, the officer doesn't show up. But he  
17 understands what happens by his continual practice of  
18 not registering a vehicle lawfully in our state.

19 MS. NEDA: If I may address again, Your  
20 Honor --

21 THE COURT: Yes.

22 MS. NEDA: -- I can demonstrate to the  
23 Court that he only drove once with an unregistered  
24 vehicle. And so the problem is Mr. Gorence is  
25 premising his argument on false facts. And I have a

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1 problem with that. I know for a fact -- and I have  
2 the court records -- twice he was lawfully  
3 registered, and as soon as they realized that, they  
4 dismissed it. The third time -- not the third time,  
5 I think this is back in 2010 -- he was driving a car  
6 that was not registered. Now, had he fled, maybe  
7 there would be some value. But just because he drove  
8 a car that wasn't registered three years ago,  
9 certainly has no probative value to his motive in  
10 March of 2014.

11 Mr. Gorence is not going to be prejudiced  
12 by not bringing in that confusing and irrelevant  
13 testimony. He can challenge whether or not, at the  
14 time of this -- because he insists it wasn't lawfully  
15 registered -- he can cross-examine him on that. You  
16 weren't lawfully registered on March 11, and that's  
17 why you fled, isn't it?

18 To bring up three years ago, that once --  
19 only once -- did he drive a car that was not  
20 registered, is just not relevant. It's confusing.  
21 It adds nothing to the case other than confusion, or  
22 insertion of bad acts. And he hasn't argued to the  
23 Court really why 404(b) is applicable here. Because  
24 he didn't flee, and he's not -- and three years  
25 ago -- and he paid the fine. He knows he has to do

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1 what he has to do as a law-abiding citizen.

2 THE COURT: Well, I think the 404(b)  
3 analysis -- and I've got some opinions on this -- as  
4 it relates to the victim -- the alleged victim in a  
5 case -- is a little different for witnesses and  
6 things than it is for the defendant. I agree 404(b)  
7 applies to witnesses, and people other than the  
8 defendants; can apply to the plaintiff as well.

9 But I think that, given the standard I've  
10 used for the Government's 404(b) evidence, I think  
11 this evidence does go to the victim's motive, perhaps  
12 in a stronger way than even the three incidents I've  
13 allowed in. And so I'm going to overrule the  
14 objection to this evidence and allow it. I do think  
15 it's 404(b). So if the Government wants a limiting  
16 instruction, it can have it. Same way the defendant  
17 can have it for the three incidents that I'm allowing  
18 in -- of Ms. Maes, Gonzales, and Ledesma, I think are  
19 the three other people.

20 All right. Anything else other than motion  
21 to disqualify and jury instructions? Have I covered  
22 everything, Ms. Neda?

23 MS. NEDA: I think so, Your Honor, yes.

24 THE COURT: How about you, Mr. Gorence?

25 MR. GORENCE: Yes, Your Honor.

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1                   THE COURT: So do you want to go to  
2 finishing up your motion to disqualify?

3                   MR. GORENCE: I would, Your Honor. And I  
4 know there are two witnesses here that we've  
5 subpoenaed. And I think they will be brief. I  
6 thought the Chief was illuminating, and it's very  
7 helpful to have this. I might not call Mr. Skinner  
8 after I talk to Captain Thornton. And I do just want  
9 to call the other two witnesses to see. Well,  
10 actually, what I'd like to do is call Mr. Sanchez  
11 first, just to see his e-mails. I haven't seen them  
12 yet. I should say re-call. But this could be brief.  
13 I thought the Chief -- you know, I want to be candid  
14 with the Court -- I don't see any FBI involvement,  
15 from his testimony, not on this. I had a duty to  
16 discern that. But I haven't seen it so far. So I  
17 see that from the Chief's testimony. But I'll be  
18 brief.

19                   THE COURT: So you want to call Mr. Sanchez  
20 first?

21                   MR. GORENCE: I do.

22                   THE COURT: Mr. Sanchez, if you'll come up  
23 and resume your place in the witness box. Mr.  
24 Sanchez, I'll remind you that you're still under  
25 oath. You can be seated.

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1 Mr. Sanchez, Mr. Gorence.

2 MR. GORENCE: Thank you, Your Honor.

3 ORLANDO SANCHEZ,

4 after having been previously sworn under oath,

5 was questioned and testified further as follows:

## EXAMINATION

7 BY MR. GORENCE:

8 Q. Officer Sanchez, yesterday you said you  
9 were going to retrieve some records, an e-mail, and  
10 your phone. Did you do that?

11 A. Yes, sir, I did.

12 Q. Can I see the --

13 A. Sure.

14 Q. -- the e-mail? Let me start with that. Is  
15 this my copy, sir?

16 A. I have two copies.

17 MR. GORENCE: So I'll take this one, and  
18 I'll mark this as F, Your Honor, for the hearing.

19 Q. Officer Sanchez, you said yesterday that  
20 you authored an e-mail. Is this the e-mail that you  
21 sent to your Sergeant, Mr. Olson?

A. Yeah, Sergeant Olson sent me this e-mail.

23 Q. He sent it to you: "Orlando, I need you to  
24 make some more changes to this report. You need to  
25 change the offense to a battery and put vehicle info

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1 in the report, and some changes to the narrative."

2 You received that on June 7?

3 A. Yeah, I received that on my department  
4 e-mail.

5 Q. And then, in response to this, did you make  
6 those changes?

7 A. Yes, I did. At the time that I got the  
8 e-mail I was already on my RDOs, my regular days off.  
9 So I text Officer -- or Sergeant Olson on my  
10 cellphone, and I said, "I don't have cellphone where  
11 I live. So send me a text." So he sent me another  
12 text. So I asked Sergeant Olson as to what changes  
13 did you make on my narrative? So I have -- also have  
14 that.

15 Q. Well, pull up your phone. I'm not going to  
16 put it on, but you might have to read it. So what I  
17 want to get to is the June 9th, when you refused to  
18 sign a new statement. Do you recall that testimony  
19 yesterday --

20 A. Yes.

21 Q. -- the day before you went to Roswell? And  
22 you said you called up Captain Thornton.

23 A. On that same day?

24 Q. I don't know if it was the same day. I  
25 thought you said -- let me ask the question. At some

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1 point your uneasiness and your concern with your  
2 report being changed --

3 A. Yes, on the 9th. On the 9th, right before  
4 I went to Roswell, I went in and I spoke to Captain  
5 Thornton.

6 Q. And what did you tell Captain Thornton?

7 A. I told Captain Thornton, I thought when me  
8 and you had talked about this case, we had said:  
9 Just do an information report on it and send it up to  
10 the DA's, and let the DA figure out what they were  
11 going to do.

12 So me and Captain Thornton talked about  
13 that numerous times. So I still -- when I send in my  
14 report, I send it in as an assault case. So a little  
15 bit after, I get the e-mail from Sergeant Olson  
16 saying, Change the report to the battery. It says, I  
17 need you to make more changes to this report. You  
18 need to change the offense to battery and put the  
19 vehicle into the report. And I made some changes to  
20 your narrative.

21 So at that point, me and another officer  
22 were already outside, me and an officer were  
23 talking -- not about this case, but we were  
24 talking -- Sergeant Olson comes outside and he tells  
25 me, "Before you leave to Roswell tonight, you need to

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1 make those changes to that report."

2 And I said, "Well, I don't know, Serg," I  
3 said, "we had already discussed that, and we labeled  
4 that as an assault case."

5 He says, "Yeah, you need to change that.  
6 So don't leave to Roswell until you make the  
7 changes."

8 Q. What you told us about yesterday -- so what  
9 I want to ask is -- and I think the Court heard that  
10 testimony. Did you have some communications that are  
11 stored electronically on your phone?

12 A. I didn't understand your question.

13 Q. Well, do you have --

14 A. I get a lot of echo in here with my --

15 Q. Do you have texts on your phone reflecting  
16 communication with -- whether it's --

17 A. Yes, I got a text on my phone. And I  
18 called back the office, or I called back Sergeant  
19 Olson. I said, "Sergeant Olson, I don't have cell  
20 service where I live in Osarco." So he sends me a  
21 text.

22 Q. What does the text say?

23 A. The text says -- I put there, "I'm in  
24 Osarco, no cell service. Call me or text me. Which  
25 car did you want me to add?" Because I didn't see

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1 him that night -- I didn't see him the night before.

2 I said, I will change -- "I will change to battery.

3 What changes did you make to my report," is what I

4 asked him on the text. But he didn't make -- he

5 didn't respond back to that.

6 Q. So is that your last involvement in this,  
7 is that you wouldn't sign it; asked for changes? Did  
8 you have any other involvement, Officer Sanchez?

9 A. Well, I didn't understand. I wanted to  
10 know what changes he had made to my narrative.

11 Because I hadn't seen Sergeant Olson before that  
12 anymore, other than the text that he said when he  
13 sent me the e-mail, that he had made changes to the  
14 narrative. So I wanted to know what changes he had  
15 made.

16 Q. And he never responded, which you've told  
17 us about?

18 A. He never responded.

19 Q. Did you have any other involvement with  
20 either Sergeant Olson or anyone else in this case --

21 A. No.

22 Q. -- about Mr. Tafoya? That was done?

23 A. That was it.

24 Q. Were you ever criticized by anyone with  
25 regard to your report, whether it be the Chief or

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1 Sergeant Thornton? Did anybody say it was  
2 insufficient?

3 A. The only thing that Sergeant Olson had told  
4 me, that according to -- I don't remember if he said  
5 the Chief or the Captain -- that the report wasn't  
6 what I had written, or something to that effect.

7 Q. No other involvement? And thanks for  
8 bringing this. That's it.

9 A. No.

10 Q. Okay. Thank you.

11 THE COURT: Thank you, Mr. Gorence.

12 Mr. Pena, any further questions of Mr.  
13 Sanchez?

14 MR. PENA: No, Your Honor.

15 THE COURT: All right. Mr. Sanchez, you  
16 may step down. Thank you for your testimony.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: May Mr. Sanchez be excused from  
19 the proceedings, Mr. Pena?

20 MR. PENA: No, sir.

21 THE COURT: Can he be excused?

22 MR. PENA: Oh, yes, sir.

23 THE COURT: All right. You're excused from  
24 the proceedings. Thank you for your testimony.

25 THE WITNESS: Thank you.

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1                   THE COURT: All right. Mr. Gorence.

2                   MR. GORENCE: Yes, Your Honor. Captain  
3 Thornton.

4                   THE COURT: Mr. Thornton, if you'll come up  
5 and stand next to the witness box over here on my  
6 right, your left. Before you're seated, Ms. Wild, my  
7 Courtroom Deputy, will swear you in.

8                   ROBERT THORNTON,

9                   after having been first duly sworn under oath,  
10                   was questioned and testified as follows:

11                   DIRECT EXAMINATION

12                   THE CLERK: State your name for the record,  
13                   please.

14                   THE WITNESS: My name is Robert Thornton.

15                   THE COURT: Mr. Thornton, Mr. Gorence.

16                   MR. GORENCE: Thank you, Your Honor.

17                   BY MR. GORENCE:

18                   Q. Sir, you are a Captain with the New Mexico  
19                   State Police?

20                   A. Yes, sir, I am.

21                   Q. Did you have any involvement in the report  
22                   writing, as it pertained to an allegation made by  
23                   Michael Tafoya, regarding an incident on March 11,  
24                   2014?

25                   A. Yes, sir. We made corrections to the

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1 report as far as grammatical errors that were on that  
2 report.

3 Q. Well, let me go back. When did you get  
4 involved in making changes to a report?

5 A. It was later on at the tail-end of the  
6 report. It was brought to my attention that there  
7 was errors in the report. And after that report had  
8 been looked at by Sergeant Olson, we reviewed it  
9 again. And based off of the report and the  
10 narrative, corrections were made to ensure that the  
11 report flowed properly.

12 Q. Your subpoena that was served last night  
13 requested that you bring documents, whether it was  
14 e-mails or any other memos, any documents that  
15 pertain to this report. Do you have anything that's  
16 responsive to that subpoena, sir?

17 A. Yes, sir, I do.

18 Q. What do you have?

19 A. Okay. What I have here is correspondence,  
20 my e-mail correspondence from Chief Kassetas to me in  
21 reference to the report, and CC'd on it are  
22 Lieutenant Skinner, Kenneth Olson, and Major Lovato.

23 Q. Anything else?

24 A. Yes, sir. There is a report, or an e-mail  
25 correspondence with an attached report, of

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1 corrections that were made from Lieutenant Skinner to  
2 Sergeant Olson.

3 Q. Is that it?

4 A. No, sir. And hold on a second. This here  
5 is an e-mail correspondence from Major Lovato and --  
6 to me and also Chief Pete Kassetas. And here is the  
7 report, finalized report, that was approved. Here is  
8 all the documentation.

9 Q. Have you had any communication with the FBI  
10 in this case?

11 A. No, sir, I have not.

12 Q. Anyone from the U.S. Attorney's Office?

13 A. No, sir, I have not.

14 Q. Have you communicated with Officer Sanchez  
15 on this case?

16 A. Yes, sir, I have.

17 Q. When, and what was discussed?

18 A. I don't have a specific date, as far as  
19 when that was discussed, but I did have a discussion  
20 with Officer Sanchez in reference to the corrections  
21 that were made on the report. And that was conducted  
22 in my office.

23 Q. Did he express concerns about his report  
24 being changed to you?

25 A. He had made mention that he didn't feel

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1 that the allegations were an assault. And it was  
2 explained to him that based off of the statement  
3 given from the victim, Mr. Tafoya, that the elements  
4 of the report allegations didn't meet a simple  
5 assault. It was indicated to him that they were a  
6 battery, a false imprisonment, and an aggravated  
7 assault with a deadly weapon, as the allegations.

8 Q. And that's -- the revised report indicated  
9 those felony offenses; correct?

10 A. Yes, sir.

11 Q. Who made that call that the report should  
12 be changed from a simple misdemeanor to these felony  
13 charges?

14 A. That was determined based off of the  
15 narrative and what the statement was given by the  
16 victim in the case. Reviewing the report, those --  
17 those actual allegations that were made, and the  
18 initial one of assault, did not fit -- or wasn't  
19 consistent with what was initially reported by  
20 Officer Sanchez. So as a supervisor, he was  
21 explained that, and he was in agreement with what  
22 needed to be amended in the report.

23 Q. My question -- I understand that. My  
24 question is who made the decision to change a petty  
25 misdemeanor to felonies?

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1           A.    That decision was made by me.  That  
2 discussion was talked with, and we had -- myself and  
3 Lieutenant Skinner were present, as well as Officer  
4 Sanchez.  And it was explained to him that the simple  
5 assault charge that was initially on the report was  
6 not accurate to the elements of what was reported.  
7 So that decision was made by me.

8           Q.    When did you make that decision?

9           A.    I don't have an accurate date, but during  
10 that discussion.  And he was aware of it, and he was  
11 advised to amend the report.

12          Q.    And did he do that?

13          A.    Yes, he did.

14          Q.    Did he sign the report?

15          A.    I did not observe him sign the report at  
16 that time, because corrections had to be made.  And  
17 from that point, corrections were made, submitted to  
18 his sergeant, and for another review.

19          Q.    Now, the Chief said -- you've had  
20 communications, and I see we have e-mails from the  
21 Chief and you.  You know the Chief looked at the  
22 report, don't you?

23          A.    Yes, sir, I do.

24          Q.    And the Chief made handwritten notations to  
25 the report?

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1 A. Yes.

2 Q. The Chief didn't think the charges had to  
3 be changed on the cover sheet, did he?

4 A. That's something he'll have to be specific  
5 with. But no, I did not get that correspondence from  
6 the Chief.

7 Q. Well, you had correspondence from the  
8 Chief, in fact --

9 A. As far as changing those charges, no, that  
10 was not indicated from the Chief.

11 Q. Well, you know the Chief made changes to  
12 the narrative and handwrote them, didn't he?

13 A. He did indicate in his e-mail as far as the  
14 changes, and the things that he noted, he documented,  
15 as far as his concerns, or how the report was  
16 written, yes.

17 Q. And you received the Chief's handwritten  
18 notations changing the narrative; correct?

19 A. Yes.

20 Q. And you incorporated that into the changes  
21 into the report, didn't you?

22 A. That was reviewed. And the changes that  
23 were made to the report were done by Officer Sanchez.  
24 But those were reviewed and they were looked at. But  
25 as far as his specific changes, I don't know if that

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1 was done. I know we made our own changes as well,  
2 which is that other report that you have.

3 Q. Well, I want to ask you, I take it -- and  
4 this is Government C -- the original report, talking  
5 about a simple assault --

6 A. Yes.

7 Q. -- this was actually -- I take it you've  
8 seen -- this signature was signed by Sergeant Olson.  
9 And he's testified he signed here --

10 A. Okay.

11 Q. -- and dated it. So this was actually  
12 finalized on or about June 6. You know that, don't  
13 you?

14 A. I'm aware of it, yes, sir.

15 Q. And you've seen that this was -- as a final  
16 report, once it's been approved by a sergeant as a  
17 reviewing officer, what's the procedure, then, to  
18 lock that, to make sure it doesn't get changed for --  
19 for whatever reason, actually?

20 A. There is a mechanism within our system,  
21 which it's manually locked into the system. And then  
22 once that's done, that's forwarded to the Records  
23 Bureau, and the Records Bureau maintains a copy of  
24 that report.

25 Q. So that would happen -- that would be

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1 locked once Sergeant Olson signed off and approved  
2 it; correct?

3 A. Not necessarily. If there are corrections  
4 that need to be made -- which in this case we were  
5 reviewing that report, although it could indicate the  
6 date here -- until it's locked, changes cannot be  
7 made to the report.

8 Q. Well, are you aware that there were Public  
9 Record Inspection Act requests made for this report?  
10 Are you aware of that?

11 A. No, sir, I was not.

12 Q. Are you aware that this report, marked as  
13 C, was disseminated as a final report to New Mexico  
14 media outlets, alleging simple assault?

15 A. Which report would this be, sir?

16 Q. I'm talking about this report -- I'll hand  
17 it to you -- where it was alleged to be, quote,  
18 simple assault --

19 A. Okay.

20 Q. -- bearing signatures -- we know -- and  
21 I'll just tell you -- this -- Sergeant Olson said he  
22 signed it and approved it; thought that that was the  
23 accurate reflection of what should be charged. And  
24 he signed Mr. Sanchez's name.

25 A. Okay.

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1           Q.     And that this was then disseminated  
2 widely -- it may come out at trial -- but widely to  
3 every media outlet, as the report of this incident.  
4 In fact, the date of this dissemination -- we can  
5 pull it -- was on June 6th or 7th. I don't know the  
6 exact date. But it was after the search warrant,  
7 before you changed it?

8           A.     Okay.

9           Q.     So my question is, how is it that when the  
10 State Police has disseminated a final report, that  
11 you go back in and change it later on?

12          A.     That's inaccurate, as far as what you're  
13 indicating. Because that signed report is the report  
14 that you're indicating was disseminated. As far as  
15 the signatures, that's not the same cover sheet that  
16 you're showing. You're mixing up the reports at some  
17 point. Because the one that was signed actually is  
18 the one that indicates the felony charges on it.

19          Q.     Well, I understand it's signed as well. I  
20 can show you that.

21          A.     Right. So --

22          Q.     I'm saying there is an earlier signed  
23 report for simple assault. And there has been  
24 testimony that Sergeant Olson signed it and agreed  
25 with it. I want you to assume that.

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1 A. Okay.

2 Q. That's what transpired yesterday.

3 A. Okay.

4 Q. So my question is, when you have something  
5 approved as a report, disseminated to the media, how  
6 is it that you go back and change it?

7 A. Because that's not a locked report, and we  
8 were still reviewing the report. As far as that  
9 report being a final report, that's not -- that's an  
10 unapproved report. Although he may have put a date  
11 on there, it was not locked, and it needed to be  
12 changed.

13 Q. And you say "needed to be changed." This  
14 was in response to the fact that there had been --  
15 why did it need to be changed?

16 A. Because it was not accurate. And our job  
17 and our policy calls that we be accurate, as  
18 supervisors, and that we -- whatever is disseminated,  
19 that it needs be comprehensive, and it needs to be an  
20 accurate report to what is alleged. That was not  
21 what was alleged is a simple assault.

22 What was alleged by the victim pertained to  
23 a false imprisonment, an aggravated assault with a  
24 deadly weapon, and a battery. So by policy, us as  
25 supervisors, we have to ensure that that final

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1 product that goes out indicates a comprehensive and  
2 accurate report. And that was not accurate.

3 Q. So you're saying Officer Sanchez made a  
4 mistake and Sergeant Olson made a mistake early on  
5 when they submitted to that, and you all didn't look  
6 at it until there was media attention following the  
7 execution of a federal warrant? Well, that's the way  
8 it kind of comes out.

9 A. That's not my statement. What I'm saying  
10 is our policy calls that we are to ensure, as  
11 supervisors, that that report is accurate when it  
12 goes out. And that was what was done. And  
13 corrections needed to be made, as far as grammatical  
14 errors, and so on and so forth. And this is no  
15 different from any basic report that we check.  
16 You're going to have amendments and you're going to  
17 find changes on any report that you do.

18 Q. And you're saying there was no involvement  
19 from any other outside agency other than the State  
20 Police?

21 A. No, sir, there was not.

22 MR. GORENCE: I have nothing further, Your  
23 Honor.

24 THE COURT: Thank you, Mr. Gorence.

25 Mr. Pena, do you have cross-examination of

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1 Mr. Thornton?

2 MR. PENA: No, sir.

3 THE COURT: Mr. Thornton, you may step  
4 down. Is there any reason Mr. Thornton may not be  
5 excused from the proceedings?

6 MR. GORENCE: No, Your Honor.

7 MR. PENA: No, Your Honor.

8 THE COURT: You're excused from the  
9 proceedings. Thank you.

10 MR. GORENCE: I'm not going to call  
11 Lieutenant Skinner. The record is developed.

12 THE COURT: Do you have any further  
13 witnesses or evidence you want to present on this  
14 motion to disqualify?

15 MR. GORENCE: No, I don't. But I will say  
16 that on this record -- and I appreciate the Court's  
17 indulgence, and of course, not knowing when I'm  
18 confronted with discovery that's different than  
19 another report. But I don't have evidence that  
20 this -- and I appreciate the Government's candor, but  
21 you never know until you start asking people under  
22 oath. But I withdraw that part of the allegations  
23 early on, that this would have -- at least my  
24 argument to the Court that I thought this was changed  
25 at the behest of the FBI and/or the U.S. Attorney's

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1 Office. On this record, I can see that's not the  
2 case.

3 THE COURT: Let me just ask the Government:  
4 Do you have any witnesses or evidence you want to  
5 present on the motion to disqualify?

6 MR. PENA: No, sir.

7 THE COURT: All right. Mr. Gorence, do you  
8 want to argue your motion?

9 MR. GORENCE: Your Honor, my motion is set  
10 forth completely in the pleadings. Notwithstanding  
11 the fact -- and again, we have a different issue,  
12 that Officer Sanchez will obviously be a witness at  
13 trial. He interviewed Mr. Tafoya. He observed him  
14 two weeks later. And all of that will come out.

15 We have a different issue about the report,  
16 but on this disqualification motion, we're still left  
17 now only with what transpired on May 7. That is  
18 unrebutted by the Government. There are threats to  
19 arrest and/or prosecute the Sheriff.

20 Now, again, I'm saying that that is  
21 something that is -- Your Honor, whether it's  
22 sufficient to disqualify a prosecutor -- because the  
23 case law says prosecutors don't have to like  
24 defendants. There is natural animosity in this very  
25 competitive environment in which we work. I

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1 understand that.

2 This is a little different in terms of a  
3 law enforcement official, like the U.S. Attorney,  
4 threatening arrest and prosecution. And I understand  
5 you can say -- the question here is, if you interfere  
6 with a Forest Service official -- well, as Mr. Arnold  
7 said, really depends on what are they doing?

8 Clearly, there is a federal statute that makes it a  
9 federal crime to interfere with an agent in the  
10 course and scope of their legitimate duties. But  
11 that doesn't mean that everything that a federal law  
12 enforcement agent does is immunized with the idea  
13 that if you interfere with that, that you're  
14 committing a crime.

15 You could have an FBI agent go in and -- in  
16 fact, I know this from firsthand experience -- when I  
17 was a brand-new assistant, someone went in to buy a  
18 mattress, who was an FBI agent, and got upset with  
19 the salesperson and drew a gun. Well, that clearly  
20 wouldn't be covered.

21 And in this case, there is a legitimate  
22 issue: Can the Forest Service cite people for pure  
23 state law infractions if they're not deputized? This  
24 is a huge -- you know it's an issue. And when  
25 someone is threatened with arrest, and shortly after

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1 that, Mr. Rodella is indicted on these charges --  
2 well, obviously there is an appearance -- and I'm not  
3 saying an appearance of a conflict is sufficient to  
4 recuse the U.S. Attorney -- but here is more. This  
5 isn't -- we'll litigate this. The U.S. Attorney --  
6 you know, to be honest, having once been an acting  
7 U.S. Attorney, and say, You know, we can litigate  
8 this; we can file a civil suit seeking declarative  
9 relief from a court, in terms of the scope of  
10 appropriate federal power in controlling our national  
11 forests, and what their law enforcement officers can  
12 do. I mean, at least when I was there, would have  
13 been kind of contemplated and on the table, rather  
14 than threatening someone with arrest and prosecution  
15 if you dare do anything other than what we say. And  
16 that's really the context Mr. Arnold talked about.

17 So, Your Honor, I'm not going to belabor  
18 the law. But this is, I believe, a political trial.  
19 And there will be evidence to that effect. Whether I  
20 seek to call -- and again, if the Court rules against  
21 me, I'll make my offer of proof that we would call  
22 and go through the Touhy to call Damon Martinez --  
23 he's the declarant -- to say yes, I made this threat  
24 not to go through what would be the ordinary process  
25 of officials in a democracy, to say, you know, we

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1 have a dispute here about what federal officials can  
2 do, vis-a-vis elected state counterparts. We don't  
3 agree, so let's take it to a federal judge and get  
4 declaratory relief.

5 No, that's not done. Instead, the  
6 uncontested testimony -- it's really telling -- is  
7 the Government doesn't bring anybody from the U.S.  
8 Attorney's Office or any of the Forest Service  
9 officials to deny the threat. So, obviously, it was  
10 made. That's the only -- because I thought maybe  
11 there would be testimony that would come before the  
12 Court saying, Y'all got it wrong. I didn't say it.  
13 I'm talking about Damon Martinez. I didn't act in  
14 this kind of way, with a federal iron fist, to say  
15 it's my way, not the highway -- because of that would  
16 be charitable -- it's my way or the jail. And that's  
17 really the context of what we have here.

18 And given that, Your Honor, given the other  
19 alternatives to how really I'm suggesting usually  
20 these kind of differences are resolved, that's the  
21 basis upon which there is a political trial. Because  
22 shortly after a May 7 meeting, an allegation that was  
23 made by Mr. Tafoya to the State Police in March; we  
24 have a search warrant that is less than three weeks  
25 after that, on June 4th; then an indictment.

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1                   So the law is all contained. If he's a  
2 witness -- and we intend to bring all of this out at  
3 trial -- he can't both prosecute and be a witness in  
4 the case, Your Honor.

5                   THE COURT: All right. Thank you, Mr.  
6 Gorence.

7                   Mr. Pena?

8                   MR. PENA: Your Honor, the gulf between  
9 what the defense refers to happening at this meeting  
10 and what the defense witnesses refer to happening at  
11 the meeting is enormous, and enormously significant.  
12 What the witness testified to is exactly what he put  
13 in his affidavit, which is a statement of law that if  
14 you try to arrest a Forest Service person while  
15 they're trying to do Forest Service business, that's  
16 a federal crime, and that will be subject to arrest  
17 and prosecution itself. That is in one category.

18                   What the defense has argued is totally  
19 inconsistent with that. And, of course, in  
20 cross-examination, when I asked Mr. Arnold, and when  
21 I quoted directly from defendant's brief on the  
22 subject, he disavowed the defendant's version of  
23 events. And the legal difference is incredible.  
24 Because if this were the way that it's been  
25 represented by the defense just now: Do anything we

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1 say, or I'm going to arrest you, my way or the  
2 highway, any of those phrases that were just used,  
3 that, in itself, would be a federal crime, extortion;  
4 it could be characterized as any number of different  
5 crimes. But that's not what the testimony ever has  
6 been, and it's utterly inconsistent with the  
7 affidavit and the defense's own witnesses.

8 Instead, what Your Honor is left with is,  
9 essentially, a normal meeting in which two agencies  
10 did not see eye to eye. But it was not any more  
11 significant than any other meeting in which two  
12 agencies disagree.

13 And then, Your Honor needs to look at the  
14 overall context of an attempt to disqualify a U.S.  
15 Attorney, a federal prosecutor. And in the response  
16 we've cited several cases, several Supreme Court  
17 cases, that refer to the enormously high threshold  
18 for something like that to take place, the huge  
19 number of factors that make courts reluctant to  
20 second-guess prosecutorial motives.

21 Your Honor has indulged the defense in a  
22 lengthy exploration that came to precisely zero in an  
23 attempt -- another defense attempt to try to meet  
24 that enormous threshold.

25 Your Honor, at this point, there has been

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1 no fact presented by any witness that would warrant  
2 any further inquiry into this matter whatsoever. And  
3 of course, made any number of additional arguments in  
4 the motion regarding the availability of other  
5 witnesses, if Your Honor wishes to assume the truth  
6 of the defense representation of their own witnesses,  
7 which is inconsistent with those witnesses.

8 And I'd be happy to answer whatever  
9 questions Your Honor has. But there is simply not  
10 enough here to warrant further inquiry.

11 THE COURT: Thank you, Mr. Pena.

12 Mr. Gorence, you have the last word on the  
13 motion.

14 MR. GORENCE: Your Honor, the redirect --  
15 and I don't know if Mr. Pena -- he obviously was  
16 here -- of Mr. Arnold, the question had to do with --  
17 and I understand where they're going, because I made  
18 an assertion in the brief based on my conversations  
19 with Mr. Arnold. And that's exactly what he said on  
20 redirect, which was: This was a very -- he called it  
21 a normal meeting. That clearly wasn't what  
22 Mr. Arnold -- he calls it an amicable meeting. I  
23 don't think that's exactly a correct characterization  
24 of the testimony.

25 But that's not how this motion would turn

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1 out, obviously. The issue that Mr. Arnold said was  
2 that there was a divide over the issue of  
3 deputization. And that's really the clear point of  
4 confrontation. Because if they are deputized as Rio  
5 Arriba Deputy County Sheriffs, then they can arrest  
6 for anything that a state law enforcement officer  
7 could, including cracked windshields, or whatever.  
8 And that's really the crux of the matter here.

9 And, as Mr. Arnold said, that this meeting  
10 never got to the agenda because it disintegrated at  
11 that point; that when the Sheriff was steadfast that,  
12 I am not going to give federal law enforcement,  
13 outside of the context of a manhunt for a killer, the  
14 ability to stop citizens in Rio Arriba for their  
15 cracked windshields; not happening. Now, maybe  
16 different sheriffs elected by the county will see it  
17 differently. But this one said: No mas, that's not  
18 on my watch.

19 That's when the meeting disintegrated. And  
20 I think that was the term that Mr. Arnold used. And  
21 it was at that point that Mr. Martinez, the U.S.  
22 Attorney, issued a threat. It is no more or no less  
23 than a threat to be arrested and prosecuted. And  
24 unlike what Mr. Pena just mischaracterized, there is  
25 no testimony that says, We'll arrest you if you

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1 arrest our Forest Service agents. The question was,  
2 If you remotely interfere with the way we see it, you  
3 will be arrested.

4 And the Sheriff said, Well, you're not  
5 being deputized. And sure enough, we have an arrest  
6 three weeks later. That constitutes a political  
7 trial, a political witch hunt. And it will be front  
8 and center in front of the jury. And I intend to ask  
9 Mr. Martinez about his threat, one in which we  
10 know -- I think this is critical in the motion, Your  
11 Honor, the only thing we really have is if it was  
12 disputed, someone -- it need not even be  
13 Mr. Martinez -- create an issue of fact that it  
14 didn't happen at all, well, then I think it would be  
15 different.

16 The Government is conceding that a threat  
17 from one appointed official by the president to a  
18 state official elected by the citizens of his county  
19 said, You're going to jail for the way you exercise  
20 your authority as Sheriff. Your Honor, that is, as I  
21 said, one, it's astounding; but two, it provides the  
22 basis and context for this political trial. And I  
23 think that's sufficient, that alone, to require  
24 recusal.

25 THE COURT: Thank you, Mr. Gorence.

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1                   Let me start maybe a little bit at the end  
2 of the analysis rather than the beginning. This is a  
3 motion to disqualify the United States Attorney's  
4 Office for the District of New Mexico, which is  
5 prosecuting this case, because Mr. Martinez will be a  
6 witness.

7                   Let me first address the law regarding  
8 disqualification of Government attorneys. From the  
9 Tenth Circuit's Bolden case, it makes it clear that  
10 "the disqualification of Government counsel is a  
11 drastic measure, and the court should hesitate to  
12 impose it, except where necessary. Courts that have  
13 allowed for the disqualification of Government  
14 attorneys do so only in limited circumstances." And  
15 perhaps most chilling is that "Every circuit court  
16 that has considered the disqualification of an entire  
17 United States Attorney's Office has reversed the  
18 disqualification."

19                   When we look at a private attorney's  
20 conflicts, they may require disqualification of that  
21 attorney's law firm in certain circumstances. The  
22 circuit courts have indicated that such an approach  
23 is not favored, when it comes to the Office of the  
24 United States Attorney or Department of Justice.

25                   And when you look at the cases that have

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1       dealt with this, some of the situations have been  
2       rather stark. The Attorney General of the United  
3       States, for example, being a district judge and  
4       presiding over cases that now his office, Department  
5       of Justice, is appealing and still involved in.  
6       Attorney General can recuse himself, and yet the  
7       Department of Justice has continued to operate those  
8       cases.

9               One of the reasons that the standard is so  
10       high is because it implicates separation of powers  
11       issues. And the generally accepted remedy is to  
12       disqualify a specific -- generally it's an assistant  
13       United States Attorney. But I think it would apply  
14       as well to the United States Attorney, and not all  
15       the attorneys in the office. And indeed, if the  
16       disqualification is one government attorney, that  
17       could serve as the predicate for the disqualification  
18       of the entirety of the United States Attorney's  
19       Office, it would be hard to get things done in our  
20       criminal justice system.

21               And the United States Court of Appeals for  
22       the Tenth Circuit said it can, quote, "Only rarely,  
23       if ever, imagine a scenario in which a district court  
24       could properly disqualify an entire United States  
25       Attorney's Office. Disqualifying an entire United

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1 States Attorney's Office is almost always reversible  
2 error, regardless of the underlying merits of the  
3 case."

4 And the Tenth Circuit has refused to  
5 disqualify an entire United States Attorney's Office,  
6 even in light of fairly extreme circumstances. In  
7 the Morris case, the United States Attorney for that  
8 district had previously served as private counsel in  
9 a civil case that accompanied the criminal case. And  
10 the Tenth Circuit noted that the United States  
11 Attorney did not participate in the criminal case,  
12 but instead, two other attorneys from his office who  
13 were not connected with the civil case prosecuted the  
14 criminal case.

15 The Sixth Circuit has held that a defense  
16 counsel was not ineffective when he did not file a  
17 motion to disqualify the U.S. Attorney's Office in  
18 Kentucky, where defendant was charged with attempting  
19 to murder the Assistant United States Attorney, who  
20 served in the U.S. Attorney's Office. And the Sixth  
21 Circuit held that because the AUSA against whom the  
22 murder attempt was orchestrated did not participate  
23 in the prosecution, and because of a strong  
24 preference not to exclude an entire United States  
25 office from a case, failing to file a motion to

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1 disqualify was not objectively unreasonable.

2 So I think that mounting the attack of  
3 trying to get the entire office disqualified is  
4 fairly difficult. And I don't see the circumstances  
5 justifying an exception from the general rule in this  
6 case.

7 I did carefully read Mr. Arnold's affidavit  
8 in preparation for the hearing yesterday, and also  
9 reviewed it yesterday and today, and of course, heard  
10 from him. And his facts are not that Mr. Martinez  
11 threatened to arrest Mr. Rodella if he did not  
12 deputize or go along with what he wanted as far as  
13 law enforcement, but in fact, was that the law  
14 enforcement should not interfere, and that such would  
15 be a crime. So I think Mr. Martinez walked the line  
16 properly in the record that's before the Court.

17 When I look at the Troutman case and the  
18 Prantil case, the Troutman case from the Tenth  
19 Circuit, of course, in those situations the Attorney  
20 General and U.S. Attorney were involved in the  
21 allegations that were part of the case. Prantil  
22 involved a fugitive case in which it dealt with the  
23 Assistant U.S. Attorneys. So those attorneys  
24 involved in the case were removed.

25 The incident that occurred over the Forest

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1 Service is a separate incident from the facts that  
2 underlie this case. And I point out that in Troutman  
3 and Prantil, still the Ninth Circuit and the Tenth  
4 Circuit still did not order disqualification.

5 So it seems to me in the case that we are  
6 about to try on Monday, Mr. Martinez, even if he were  
7 going to be a witness, it would not disqualify the  
8 entire office. But I also conclude that Mr. Martinez  
9 will not be a witness in the case. He is not  
10 competent to testify on any of the events that are at  
11 issue in this trial. And his feelings toward Mr.  
12 Rodella, at least on the records before the Court,  
13 seem to be appropriate in his job as a law  
14 enforcement person. But even if he had the personal  
15 animosity or ill will toward Mr. Rodella, as a  
16 prosecutor, I do not think that would disqualify him.

17 So I don't think Mr. Martinez is going to  
18 be a witness in the case. So the predicate for the  
19 motion to disqualify is not present. So the Court  
20 will deny the motion to disqualify the U.S.  
21 Attorney's Office, because I don't see that  
22 Mr. Martinez is going to be a witness. But even if  
23 he were, I don't think it would form a predicate for  
24 disqualifying the entire office.

25 All right. What else do we need to

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1 discuss? I know you've got your flight.

2 MR. GORENCE: I appreciate that, Your  
3 Honor. I haven't met this Judge in St. Louis. I  
4 prefer not to make a bad impression on the first  
5 go-round.

6 I understand the Court's ruling clearly,  
7 and I do understand, particularly the way you've  
8 articulated the predicate, because that is the  
9 issue -- and I think we cited all these about how  
10 hard the standard is and how high, in our brief. And  
11 I realize that. My question is -- and I was even at  
12 one point, if Mr. Martinez was going to be a witness,  
13 there is a procedure to have an acting U.S. Attorney,  
14 where he has no involvement. That takes care of what  
15 we talked about as the supervision. But I have a  
16 question on appeal -- on preservation on this. And I  
17 would actually like to preserve this issue,  
18 theoretically, for appeal.

19 If it's acceptable with the Government, I  
20 can use this record and not go through and actually  
21 get a subpoena for Mr. Martinez, go through the Touhy  
22 regs and make a proffer with his testimony, if that's  
23 acceptable with the Government. Because, Your Honor,  
24 I understand that if this were to go up, the  
25 Government would say, Well, you didn't subpoena him,

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1 you didn't make a record. And the Court said, "even  
2 if he was" -- I don't have the transcript, but even  
3 if he was a witness, it wouldn't require  
4 disqualification. I understand that.

5 But at this point, I also heard the Court  
6 saying he will not be a witness, it's not relevant.  
7 I need to preserve both of those. And what I'd like  
8 to do, if it's acceptable with the Government is, I  
9 think this hiring with Mr. Arnold and his testimony,  
10 and the argument actually preserve what I would be  
11 eliciting. And that proffer would be: You had this  
12 meeting, you made this threat, and here's what you  
13 said. And it would be along the lines of what  
14 Mr. Arnold said, as well as my proffer to the Court  
15 on behalf of Representative Rodella and Former County  
16 Commissioner Martinez. If that's acceptable to the  
17 Government.

18 THE COURT: Let me ask Ms. Neda. Does Mr.  
19 Gorence need to go through the steps of attempting to  
20 subpoena Mr. Martinez to preserve this issue?

21 MS. NEDA: Your Honor, the Court has  
22 already ruled on this issue. Mr. Gorence never  
23 subpoenaed Mr. Martinez, when he could have for this  
24 issue. So I think the request is untimely, and  
25 unnecessarily prolonging something that was quite

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1 obvious all along. And that is this: The U.S.  
2 Attorneys and the FBI had no involvement with the  
3 preparation of the NMSP report --

4 THE COURT: Let me phrase it maybe this  
5 way, maybe this will cut through where everybody  
6 needs to be. Sometimes in these cases, the trial  
7 attorneys are already consulting the appellate  
8 lawyers on jury instructions and things of that  
9 nature. I don't know if that's the case here -- and  
10 you don't need to tell me -- but could you maybe talk  
11 to the appellate lawyers, and see if they'd be  
12 willing not to raise the issue that -- the issue that  
13 Mr. Gorence wants to advance to the Tenth Circuit,  
14 they will not raise the issue that Mr. Martinez was  
15 not subpoenaed in this matter?

16 MS. NEDA: But he wasn't.

17 THE COURT: I know. But they'll not raise  
18 that as saying that Mr. Gorence has waived the issue  
19 here below.

20 MS. NEDA: But he has.

21 MR. GORENCE: Well, Your Honor --

22 MS. NEDA: I can ask the appellate --

23 THE COURT: I think you're getting the  
24 answer.

25 MR. GORENCE: I get the answer. I didn't

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1 need him for this hearing. That's not what he's  
2 going to be subpoenaed for.

3 THE COURT: But you will for the trial.

4 MR. GORENCE: I will issue a trial  
5 subpoena.

6 THE COURT: So we're going to have to go  
7 through those motions to -- probably me quashing it.  
8 But is that necessary, if I just indicate today that  
9 he will not testify? Could you maybe talk to your  
10 appellate lawyers, and see if they could just agree  
11 that they're not going to raise the argument that  
12 because Mr. Martinez is not subpoenaed for trial --

13 MS. NEDA: For trial. Excuse me. Yes, I  
14 will talk to them about that.

15 MR. GORENCE: And here's the thing, Your  
16 Honor, because I need to get that off, and that has  
17 to be served. It's got very different service  
18 requirements. So if they want me to go through that,  
19 I'll gladly do it. And I understand it's only  
20 preservation. And I think it's required, because  
21 otherwise, they're going to have to say, Well, you  
22 wanted to call someone but didn't subpoena him, he's  
23 on your list. And I would -- you know, the proffer  
24 of that, we can either -- I don't think you want to  
25 bring the U.S. Attorney to go over that, but I could

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1 do it, if that's what the Government wants, in terms  
2 of my Q and A.

3 THE COURT: Maybe you could just let --  
4 when are you going to be back in pocket?

5 MR. GORENCE: I don't get back until -- I  
6 couldn't get a flight back, because we have an all  
7 day hearing and it starts in the afternoon in St.  
8 Louis, so I'll be back on Thursday. I have a  
9 deposition in Palm Springs on Friday. But I'm not  
10 sure I'll be doing that.

11 THE COURT: Say 10:00 on Thursday, could  
12 you let Mr. Gorence know? Because if he doesn't hear  
13 from you, then he'll need to go ahead and subpoena  
14 Mr. Martinez for trial.

15 MS. NEDA: I won't be here either, but Mr.  
16 Pena will alert the appellate people. We're trying  
17 to articulate the question. I think the question is  
18 that if he doesn't subpoena Mr. Martinez for trial,  
19 given the fact that it will be futile efforts, as the  
20 Court has already said he may not be a witness, will  
21 he have waived his right? And we will ask the  
22 appellate section and the DOJ about that question.

23 MR. GORENCE: The Court's actually right.  
24 If he's not a witness, my whole motion falls away.  
25 The Court would say, Well, you didn't subpoena him,

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1       nor is he here. So there is no basis for this  
2 motion. So I think Ms. Neda is right. If I get that  
3 response, great. And if not, if they say no and  
4 subpoena him, then we can talk whether it's real  
5 testimony or a proffer.

6               I appreciate that, Your Honor. Other than  
7 that, I have nothing further.

8               THE COURT: How about you, Ms. Neda,  
9 anything further? Do you want to tackle jury  
10 instructions, or do you want to see my first set, and  
11 see what I do first before anybody argues those?

12              MS. NEDA: I actually have an appointment,  
13 so if we conclude now, I would greatly appreciate it.

14              THE COURT: All right. Let me go over a  
15 few things with you before you leave. I do have now  
16 all the exhibits. I do have the defendant's and I  
17 have the plaintiff's. I do want your articles so  
18 that I can make that determination on that one point  
19 that Dr. Sanders -- whether I'm going to allow him to  
20 testify on that. I need your PowerPoint. I still  
21 haven't seen the PowerPoint. All right. I'll work  
22 with Ms. Wild. But I may need to see that, and I  
23 think that's it.

24              All right. So I will see you 8:30 on  
25 Monday morning. If anything else comes up, give us a

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1 call.

2 Oh, this is the one other thing I was going  
3 to ask you. Obviously, I have lots of orders and  
4 opinions to get out. Is there anything the  
5 Government would like to be at the top of the list  
6 for me to work on before I see you?

7 MS. NEDA: I don't believe so, Your Honor,  
8 as long as it's consistent with what we've done here.  
9 I think we understand where you're going.

10 THE COURT: How about you, Mr. Gorence?

11 MR. GORENCE: I concur, Your Honor.

12 THE COURT: So I'll just pick the ones I  
13 think I need to work on to satisfy myself that the  
14 rules I've given you are correct. Otherwise, I'll  
15 see you at 8:30 on Monday morning.

16 If y'all let me just ask one other  
17 question. Do you have any better estimate now, with  
18 the rules that you've received today, as to how long  
19 you think this trial will last, or what you want me  
20 to tell the jury? Ms. Neda?

21 MS. NEDA: Your Honor, that portion was the  
22 defense. So perhaps, the better question would be  
23 posed to --

24 THE COURT: What about you, Mr. Gorence?

25 MR. GORENCE: That's fair. I think with

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1       Mr. Overby -- and I want to see, obviously, the  
2       Court's opinions, because -- and I think the Court's  
3       ruling on Dr. Sanders will -- he wasn't going to be  
4       long anyway -- the 404(b), I think we'll finish. If  
5       the Government finishes their case by Thursday early  
6       in the morning -- I have one day, and I think I'll  
7       put our case on within a day, assuming -- but, again,  
8       if they don't call people on their list -- for  
9       instance, there are Rio Arriba Officers Randy  
10      Sanchez, Officer Gutierrez -- if for some reason they  
11      don't call those people, then I will be calling them.  
12      And they've listed Officer Turrieta, who was the  
13      Santa Clara officer who came later. He's on their  
14      list, but if he isn't called, and done within their  
15      two-and-a-half day estimate.

16           But having said that, Your Honor, you know,  
17      that this was -- I think actually the phone records  
18      will indicate a seven-minute interaction. And to be  
19      candid -- and I'm being -- actually, I don't mean to  
20      be facetious with the Court, if we can't try a  
21      seven-minute case in a week, then something seems a  
22      little amiss. So I am guardedly optimistic that  
23      we'll do this.

24           THE COURT: Let me ask Ms. Neda, do you  
25      think it would be a good bet that you'll be done by

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1       midday on Thursday?

2            MS. NEDA: Yes, Your Honor.

3            THE COURT: Okay.

4            MS. NEDA: Your Honor, if I may continue.

5       It would be quicker if we don't have to bring chain  
6       of custody witnesses. And I'm not certain whether or  
7       not the defense has stipulated to chain of custody.

8       The only ones I can think of -- we're good on the  
9       Verizon, the telephone records, so there is no issue  
10      there.

11           But I'm thinking of the firearm, and the  
12       badges that were seized during the execution of the  
13       search warrant. If we have to bring those into  
14       evidence, then there is a chain of custody that would  
15       require several FBI agents. One of the badges was --  
16       well, all the badges were tested, and sent to the DNA  
17       lab at the FBI in Washington. And so there would be  
18       an extra chain of custody individual to say, I put  
19       that in the proper mail service and received it back.  
20       So you're talking about maybe at least two, maybe  
21       three extra witnesses, that unless there is an issue  
22       about chain of custody, I think we should probably  
23       dispense with those to save the Court's time, if Mr.  
24       Gorence agrees.

25            MR. GORENCE: Your Honor, I haven't seen

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1 the badges yet, and so I, obviously, can't stipulate  
2 to something until they're actually produced. And  
3 I've been asking -- and I guess they are on their way  
4 back from Quantico. And I'm assuming, you know, when  
5 I do that, that's a possibility.

6 The other problem is they did have the  
7 firearm with the safety lock that, obviously, the  
8 Court Security requires. My problem is, is that it  
9 was provided to me, but I can't talk to my client  
10 because the Government is insisting that they  
11 maintain a line of sight, as well as with an FBI  
12 agent. So I can't talk to my client. And I'm not  
13 about to do it with -- I can't talk to Mr. Rodella.  
14 So I told them, whatever procedure they want, they  
15 can bring an unloaded firearm with the safety lock,  
16 and I don't think we need more than five minutes.  
17 But if they insist that I cannot talk to Mr. Rodella  
18 unless they are present, to make these determinations  
19 about what it is, and then I'll have to -- then I  
20 have no recourse given their rules. Bring them all.  
21 But if I could have five minutes to talk to him and  
22 we could look at it, I think those stipulations would  
23 be forthcoming. But I will not try to have a group  
24 junta with the Government before we make important  
25 determinations about evidence. That's not the

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1 adversarial process, and it's not the way I practice  
2 law.

3 THE COURT: Well, let's do this: I'll plan  
4 on a five-day trial, and -- but let's listen to the  
5 jurors. If anybody has got a problem on Monday or  
6 Tuesday, then we probably ought to put that in the  
7 back of our head.

8 As far as telling the jurors -- we'll tell  
9 them that it's a five-day trial, and see if that will  
10 just save any concerns about their schedules.

11 All right. I appreciate your hard work  
12 over the last two days. I'll try to get these  
13 opinions out to you. And I'll see you on Monday  
14 morning.

15 MS. NEDA: Thank you, Your Honor.

16 THE COURT: Y'all have a good evening.

17 (The Court stood in recess.)

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2  
3 UNITED STATES OF AMERICA  
4 DISTRICT OF NEW MEXICO  
5  
6

7 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,  
8 Official Court Reporter for the State of New Mexico,  
9 do hereby certify that the foregoing pages constitute  
10 a true transcript of proceedings had before the said  
11 Court, held in the District of New Mexico, in the  
12 matter therein stated.

13 In testimony whereof, I have hereunto set my  
14 hand on January 16, 2015.

15  
16  
17  
18   
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